Supreme Court, U.S.
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No. 09-20

In The Supreme Court of The United States

STEVEN GREEN, et al.

Petitioners,

v.

JEFFERSON COUNTY COMMISSION and THE GENERAL RETIREMENT SYSTEM FOR EMPLOYEES OF JEFFERSON COUNTY, ALABAMA

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Should this Court resolve a split in the Circuits interpreting 28 U.S.C. § 636(1(b)(C) by requiring a waiver of the right to further judicial consideration of any sort as to any issue where a magistrate makes a recommendation as to the determination of the issue and no specific objection to that determination is made by either party to the district judge?

2. Should this Court extend the decision in *Thomas v. Arn*, 474 U.S. 140 (1985), to resolve a split in the Circuits by requiring the Circuits to adopt and implement a rule conditioning any further review of the magistrate's recommendation upon the filing of specific objections to the magistrate's report identifying those issues on which further review is desired?

3. Should this Court resolve a split in the Circuits by requiring the Circuits to adopt the Sixth Circuit rule approved in *Thomas v. Arn*?

4. Whether the rule of waiver applies where an appellate court is considering *de novo* the grant of a summary judgment to prevent consideration in that *de novo* review of any issue to which there was no objection?

5. Whether an appellate court can affirm a summary judgment based on other grounds by rejecting the grounds on which the district court granted the summary judgment in favor of the grounds

not objected to in the magistrate judge's Report and Recommendation?

6. Whether an appellate court can, consistent with the Due Process Clause, affirm a summary judgment on grounds waived by the successful movant and neither briefed nor argued to the appellate court and where such action would improve the position of the party receiving summary judgment and worsen the position of the party against which summary judgment is granted?

PARTIES TO THE PROCEEDING

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PETITIONERS

Jefferson County Commission
RESPONDENT

The General Retirement System for Employees of Jefferson County, Alabama
RESPONDENT

TABLE OF CONTENTS

Page(s)

ISSUES PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

Opinion and Orders Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 7

(a) The *Green* State Court Action 8

(b) The *Black* State Court Litigation 9

(c) The Instant Case 11

(d) The Eleventh Circuit Opinion 12

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

I. The Split in the Circuits 17

II. The *Arn* Opinion and The Sixth Circuit Rule 21

III. Waiver and Appellate Review 24

CONCLUSION 27

APPENDIX

Eleventh Circuit Court of Appeals Opinion (March 31, 2009) A-1

United States District Court Order (October 7, 2008) A-24

United States District Court Memorandum Opinion (October 7, 2008) A-25

Objections to Report and Recommendation of Magistrate Judge File September 11, 2008 .... A-27

United States District Court Report and Recommendation A-44

TABLE OF AUTHORITIES

Cases:

Alexander v. Sandoval,
532 U.S. 275 (2001) 23

Baxter v. Sullivan,
923 F.2d 1391 (9th Cir. 1991) 20

Bonanni Supply, Inc. v. U.S.,
959 F.2d 1558 (11th Cir. 1992) 27

Brown v. Berkeley County School District,
339 F.Supp.2d 715 (D.S.C. 2004) 18-19

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 24

Dandridge v. Williams,
397 U.S. 471 (1970) 26-27

Davis v. Geren,
272 Fed. Appx. 82 (2d Cir. 2008) 17-18

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462 (1986) 5

Donaldson v. U.S.,
281 Fed. Appx. 75 (3d Cir. 2008) 19-20

Douglass v. United Services Automobile Assoc.,
79 F.3d 1415 (5th Cir. 1996) 20

Duffield v. Jackson,
545 F.3d 1234 (10th Cir. 2008) 19

FDIC v. Zook Brothers Constr. Co.,
973 F.2d 1448 (9th Cir. 1992) 20

Frontier Ins. Co. v. Blaty,
454 F.3d 590 (6th Cir. 2006) 19

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 16,27

Hicks v. City of Buffalo,
124 Fed. Appx. 20 (2d Cir. 2004) 18

Hoffman v. Allied Corp.,
912 F.2d 1379 (11th Cir. 1990) 25

Kun v. Berkeley County Government,
214 F.Supp.2d 559 (D.S.C. 2001) 19

Lorin Corp. v. Gota & Co., Ltd.,
700 F.2d 1202 (8th Cir. 1983) 21

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 24

Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital,
415 F.3d 145 (1st Cir. 2005) 17

Nara v. Frank,
488 F.3d 187 (3d Cir. 2007) 20

Nat'l R.R. Passenger Corp. v. Roundtree Transp. and Rigging,
286 F.3d 1233 (11th Cir. 2002) 12,13,25

Park Motor Mart, Inc. v. Ford Motor Co.,
616 F.2d 603 (1st Cir. 1980) 17

Rooker v. Fid. Trust Co.,
263 U.S. 413 (1923) 5

Taylor v. Farrier,
910 F.2d 518 (8th Cir. 1990) *21*

Thomas v. Arn,
474 U.S. 140 (1985) ..... *passim*

Title v. Jefferson County Commission,
10 F.3d 1535 (11th Cir. 1994) 25

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 23

U.S. v. Arami,
536 F.3d 479 (5th Cir. 2008) *20*

U.S. v. Benton,
523 F.3d 424 (4th Cir. 2008) 18

U.S. v. Guerrero,
524 F.3d 5 (1st Cir. 2008) 17

U.S. v. Hall,
716 F.2d 826 (11th Cir. 1983) 20

U.S. v. Hall,
462 F.3d 684 (7th Cir. 2006) 19

U.S. v. Midgette,
478 F.3d 616 (4th Cir. 2007) 18

U.S. v. Raddatz,
447 U.S. 667 (1980) 24

U.S. v. Schronce,
727 F.2d 91 (4th Cir. 1984) 18

U.S. v. Walters,
638 F.2d 947 (6th Cir. 1981) 19

Wardell v. Maggard,
470 F.3d 954 (10th Cir. 2006) *19*

Younger v. Harris,
401 U.S. 37 (1971) 6

CODES:

28 U.S.C. § 636 1

28 U.S.C. § 636(b)(1)(B) 13,14,21,25

28 U.S.C. § 636(b)(1)(C) . . . . . *passim*

28 U.S.C. § 636(c)(3) 26

42 U.S.C. §§ 300bb-1 to bb-8 4,11

42 U.S.C. § 1983 4,11

OTHER:

Alabama Act 2003-343 4,7,9

H.R. Rep., at 3, U.S. Code Cong. & Admin. News 1976, p. 6163 24

Jefferson County Resolution No. 2006-683 .. *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review of judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the district judge adopting the magistrate's report and recommendation is not reported. The decision of the Eleventh Circuit Court of Appeals is reported at 563 F.3d 1243 (11th Cir. 2009). All relevant opinions and orders of the magistrate judge and the district court are in the Appendix.

JURISDICTION

The Eleventh Circuit opinion in this case was entered on March 31, 2009. This was a final judgment of the Eleventh Circuit under the provisions of Rule 10(a) Supreme Court Rules because it conflict with decisions concerning 28 U.S.C. § 636(b)(1)(C) of other courts of appeal, as to which there is a split of authority among the Circuits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 636 provides:

> (b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to supreme evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (a), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendation as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

United States Constitution, Fifth Amendment, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On January 29, 2008, the Petitioners, consisting of one hundred four named Jefferson County, Alabama Deputy Sheriffs, active and retired, filed suit against the Jefferson County Commission and the General Retirement System for Employees of Jefferson County, Alabama, the Respondents. The suit challenged a resolution of the Jefferson County Commission, Jefferson County Resolution number 2006-683 adopted on June 7, 2006 (hereinafter "Resolution"), which had the effect of eviscerating Alabama Act 2003-343 (hereinafter "Act"), a local law that allowed employees of the Sheriff's Department to make up to a maximum of twenty past years during which they did not participate in the General Retirement System for Employees of Jefferson County, Alabama (hereinafter the "Retirement System"). The complaint charged that the Resolution was adopted by the Jefferson County Commission to avoid the effect of the Alabama statute, the adoption of which Jefferson County had for many years fought against in the legislature. The Resolution stated that any person who elected to obtain the benefits provided under the Act would not be entitled to retiree healthcare coverage or sick leave retirement benefits which were available to all other retirees. The complaint contained two counts. The first count charged a violation of the Public Health Services Act, 42 U.S.C. §§ 300bb-1 to bb-8 (hereinafter "PHSA"). Count Two charged a violation of 42 U.S.C. § 1983.

This case was assigned to a magistrate judge instead of an Article III judge.[1] On February 21, 2008, the Respondents filed two motions to dismiss. On July 2, 2008, the magistrate judge on motion of Petitioner entered an order treating the Respondents' motion to dismiss as a motion for summary judgment because of the documents outside the pleadings which the Respondents had filed in support of their motion to dismiss.

On September 11, 2008, the magistrate judge prepared a Report and Recommendation in which he recommended that the Respondents' motion for summary judgment be granted as to the Petitioners who were named in the previous state action, Green, Persall, Owen, Horton, Phillips, and Bell, on the authority of *Rooker-Feldman* derived from the cases of *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1986.) The magistrate judge recommended

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[1]In the United States District Court for the Northern District of Alabama, cases when they are filed are randomly assigned to the Article III judges on the court and to magistrate judges. This case was assigned to a magistrate judge. Neither of the parties agreed that the magistrate judge could hear the case. Therefore, the magistrate judge could not issue dispositive orders, but was authorized to issue interim orders and to make recommendations to an as yet unselected Article III judge as to dispositive matters. The procedure is that when the magistrate judge makes a recommendation, a district judge will be randomly selected to do a *de novo* review of the magistrate judge's report and recommendation. The district judge when selected may then accept the recommendation, reject it and refer it to the magistrate judge for further proceedings, or the judge may issue her own opinion. (*Id.*).

that Respondents' motion be granted as to all of the other petitioners based on the court's discretionary authority under the *Younger* abstention doctrine derived from the case of *Younger v. Harris*, 401 U.S. 37 (1971). The magistrate's further recommendation was that Respondents' claim that the summary judgment be granted on the basis of *res judicata* be rejected because he determined that *res judicata* was not applicable. The Report and Recommendation recommended that the case be dismissed with prejudice. It advised the parties of the need to object.

On September 22, 2008, Petitioners filed their objections to the Report and Recommendation. Respondents filed no objections to the magistrate's recommendation even though he recommended that their *res judicata* ground for summary judgment be rejected.

On October 3, 2008, the magistrate judge referred the Report and Recommendation "to a district judge for final disposition."

On October 7, 2008, District Judge Inge Johnson entered a Memorandum Opinion and an Order adopting the magistrate judge's Report and Recommendation and dismissing the case with prejudice as to all Petitioners.

Petitioners appealed the district judge's order to the Eleventh Circuit. That court rejected the grounds on which the magistrate judge and the district court had recommended and granted the summary judgment. However, that court rejected the grounds

on which the district court granted the summary judgment and went to the magistrate's recommendation to revive the *res judicata* ground which the magistrate recommended be denied. Respondents made no objection to this recommendation of the magistrate. The Eleventh Circuit affirmed the grant of the summary judgment solely on the basis of the *res judicata* ground. *Green v. Jefferson County Commission*, 583 F.3d 1243, 1251-1254 (11th Cir. 2009).

STATEMENT OF THE FACTS

In 2003, the Alabama Legislature approved a local law, Alabama Act 2003-343 (hereinafter "Act"), that allowed certain county employees to make up contributions for the years that they did not participate in the General Retirement System for Employees of Jefferson County, Alabama (the "Retirement System").

In response, the County Commission adopted Jefferson County Resolution No. 2006-683 (hereinafter the "Resolution") on June 7, 2006. The Resolution provided that any person who elected to obtain the enhanced pension benefits under the Act would not be entitled to two types of benefits available to all other retirees: (a) retirement health care coverage, and (b) sick leave retirement benefits. The County distributed the Resolution to persons eligible under the Act before they elected, as required by the Resolution, whether they wanted to obtain the enhanced pension benefits provided by the Act or whether they wanted to remain

eligible for retiree health coverage and sick leave retirement benefits.

(a) The *Green* State Court Action

On May 18, 2007, Steven Green, Mark Persall, Larry Owen, Charles Horton, James Phillips and Cassie Bell filed a complaint seeking class action certification in the Circuit Court for Jefferson County, Alabama against the Retirement System and the County.

The petitioners in the state court action sought a declaratory judgment enjoining the Resolution in its entirety, as well as an injunction preventing the operation of the Resolution. The petitioners in the *Green* action sought to represent the Jefferson County employees who had been subjected to one or more aspects of the systematic retaliation and/or administered unequal treatment by the enactment of the Resolution.[2] The size of the class was identified as "107 Jefferson County employees." The defendants moved for summary judgment, which was granted by the following order:

> For the reasons stated therein, the defendants' motion for summary judgment is due to be GRANTED. Neither the named class representatives nor any members of the putative class may maintain the claims raised in the complaint.

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[2] The putative class members were not listed. The state court did not even mention class certification in any of his orders.

> This action is therefore DISMISSED with prejudice, costs taxed as paid.

(State Court Sum. Judg. Order at 67).

The plaintiffs in the state court action filed a Motion for New Trial to Alter, Amend or Vacate Judgment and for Relief from Judgment. After a hearing, the trial court denied this motion, without comment, on October 23, 2007. The state court plaintiffs thereafter filed a notice of appeal to the Alabama Supreme Court on November 1, 2007. On November 14, 2008, the Alabama Supreme Court in that appeal issued an opinion affirming that summary judgment.

(b) The *Black* State Court Litigation

When Act 2003-343 was enacted, various lawsuits were filed in 2003 by Jefferson County employees concerning its constitutionality because the Respondents would not comply with the Act. Those cases were consolidated, with Jimmy Black identified as the lead plaintiff. The Resolution was passed while the *Black* Litigation was pending, but not until after the court entered an order finding the Act constitutional and ordering Jefferson County to implement it. On June 19, 2006, seven months after the court had ruled the Act to be constitutional, the employees seeking benefits under the Act in the same case filed a motion for preliminary injunction against implementation of the Resolution. The court on September 14, 2006, denied the preliminary

injunction. The order doing so reads in pertinent part, as follows:

> Before the Court is a Motion for Supplemental Relief seeking to enjoin the enforcement of the Resolution.
>
> ...
>
> In adopting the Resolution, the Commission did not abuse their vested discretion, and did not engage in fraud. This Court's inquiry must end there, as the authority to determine the amount of appropriations necessary for the performance of government function is a legislative power, not a judicial power. ... This Court would infringe upon the boundaries between our State's branches of government delineated in Sec. 43 of the Alabama Constitution if it were to enjoin this Resolution. This Court also find [sic] that the issues presented in Plaintiffs' challenge to the Resolution are completely separate and involve different facts, issues, and theories than the previous action challenging Act 03-343. Thus, the Court finds that there is no justiciable issue involved in the Plaintiffs' motion for Supplemental Relief. (emphasis supplied).

(*Black* Order, Sept. 18, 2006 at 93-95).

(c) The Instant Case

One hundred four individual plaintiffs, the Petitioners, filed a complaint in the United States District Court for the Northern District of Alabama on January 29, 2008 challenging the Resolution on the grounds that it was a violation of 42 U.S.C. § 300bb-1 to 8, the Public Health Services Act (hereinafter "PHSA"), and 42 U.S.C. § 1983.

The Petitioners alleged:

> 116. The adoption of [the] resolution ... was violative of the procedural due process rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. ... Defendants have wrongfully and constitutionally attempted by the Resolution to punish Plaintiffs and those acting within them who accepted the benefits of the Act.
>
> ...
>
> 120. Plaintiffs aver that Defendants have deliberately injured and damaged them by establishing a policy of discriminating against them in intentional violation of their constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs aver that the said policy was put into place by the Resolution. Defendants first refused to implement the Act in violation of Plaintiff's due process and equal protection rights. When the Alabama courts declared the Act

valid and ordered defendants to implement it, Defendants adopted the Resolution to punish those who took advantage of the Act, again in violation of Plaintiffs' constitutional rights.

(d) The Eleventh Circuit Opinion

The Eleventh Circuit Opinion states that:

> Although neither party challenges the district court's finding that *res judicata* does not apply in this case, we review *de novo* all portions of a district court's order granting summary judgment and may affirm on any legal ground. *See Nat'l R.R. Passenger Corp. v. Roundtree Transp. and Rigging*, 286 F.3d 1233, 1263 (11th Cir. 2002) (explaining that an appellate court may affirm the district court's grant of summary judgment "as long as the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted, or rejected by the district court") (internal quotation and citation omitted). After reviewing this case and the related state court cases of *Black* and *Green I* – including the Alabama Supreme Court's recent decision in *Green I* – we conclude that, as a matter of law, consideration of this case is precluded by the state courts' judgments in *Black* and *Green I* under the doctrine of *res judicata*. (563 F.3d at 1251-1252).

The appeals court stated that *National R.R. Passenger Corp. v. Roundtree Transport and Rigging*, 286 F.3d 1233, 1263 (11th Cir. 2002) held "that an appellate court may affirm the district court's grant of summary judgment" as long as the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.

On October 7, 2008, Petitioners appealed the district judge's order to the United States Court of Appeals for the Eleventh Circuit. Respondents did not file an appeal or cross-appeal.

The *Rooker-Feldman* doctrine and the *Younger* abstention issues were the only issues briefed on appeal by the parties.

SUMMARY OF THE ARGUMENT

The provisions of 28 U.S.C. § 636(b)(1)(B) authorize a district judge to designate a magistrate judge to conduct hearings on dispositive pre-trial motions and to submit to the district judge proposed findings of fact and recommendations for disposition. 28 U.S.C. § 636(b)(1)(C) provides, in relevant part, that within ten days of being served with a copy, any party may file written objections to the proposed finding and recommendations and the district court "shall" make a *de novo* review of those portions of the proposal "to which objection is made." There are no other review provisions in the statute.

Respondents sought summary judgment which was referred to a magistrate judge. The magistrate's recommendation was that the summary judgment be granted on the basis of the *Rooker-Feldman* doctrine and *Younger* abstention doctrine, but recommended that the Respondents' *res judicata* ground for summary judgment be denied. Petitioners filed objections. Respondents did not. The district court adopted the magistrate's report and recommendation. Petitioners appealed. Respondents did not cross-appeal. The court of appeals held *Rooker-Feldman* and *Younger* did not apply, but affirmed the summary judgment on the *res judicata* grounds.

There is a split in the circuits as to whether failure to object to an issue in a magistrate's recommendations waives all further judicial review on that issue or waives further judicial review only as to factual issues or does not waive anything.

In the *Thomas v. Arn* case, this Court reviewed the Sixth Circuit's rule of waiver of all further review and found 28 U.S.C. § 636(b)(1)(B) and (C) did not prohibit such a rule. The Court specifically declined to decide whether § 636(b)(1)(B) and (C) required such a rule, but made other findings that pointed toward § 636(b)(1)(B) and (C) requiring such a rule, particularly from a practical point of view.

Petitioners submit that this Court should resolve the conflict among the courts of appeal on this point by making mandatory a waiver of all further judicial review of an issue decided adversely to a party to which the party does not object under § 636(b)(1)(B)

and (C)) because such a rule would effectuate the purpose of Congress in adopting the statute.

Application of the complete waiver rule would remove from the court of appeals' *de novo* review of summary judgments consideration of the unobjected to issue just as § 636(b)(1)(C) removes such issues from the district court's *de novo* review of the magistrate's recommendation.

The Eleventh Circuit erred in this case by affirming the summary judgment on an issue determined against the movant by the magistrate in his recommendation to the district judge to which determination the movant did not object and did not appeal because the court of appeals failed to apply the absolute waiver rule to its *de novo* review of the summary judgment.

Moreover, the Eleventh Circuit erred because it had no jurisdiction to overrule the recommendations of a magistrate judge, which it did in this case. Since the proper § 636(b)(1)(C) specifically excludes the issue of *res judicata* from the district court's *de novo* review, it is excluded from the court of appeals' *de novo* review.

Finally, the court of appeals erred by affirming the summary judgment on its own incentive on a ground not objected to and which Petitioners had no notice was still in the case because such action improved the position of Respondents and worsened the position of Petitioners. Use of the appellate power under these circumstances is prohibited by this Court. The issue was not appealed, briefed, or argued.

Petitioners were deprived of their property without due process of law because they had no opportunity to be heard in a meaningful manner.

Petitioners' position is that this Court should extend the *Thomas v. Arn* opinion to resolve a split in the Circuits and require absolute waiver of any further judicial review of any issue as to which a recommendation is made in a magistrate judge's report and recommendation pursuant to § 636(b)(1)(B) and (C) to which neither party objects. The absolute waiver rule should apply to this case to prevent the court of appeals from using on its own initiative any ground to which no objection was made to affirm a summary judgment for Respondents. Though under some circumstances an appellate court may use a ground not considered by the district court, it may not do so where the ground has been waived by the failure of either party to object to the ground under 28 U.S.C. § 636(b)(1)(B) and (C). The appellate court cannot affirm a summary judgment on a waived issue because that improves the position of one party and worsens the position of the other which is prohibited by *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

ARGUMENT

This petition presents a split in the circuits as to what rule of further review of an issue applies when a litigant fails to object to that issue in a Report and Recommendations ("RR") of a magistrate judge as required by 28 U.S.C. § 636(b)(1)(C). There is a split in the Circuits on this question ranging from a

complete waiver barring further consideration of the issue not objected to (First, Second, Fourth, Sixth, Seventh and Tenth Circuits) to no waiver of a question of law or mixed question of law and fact (Eighth Circuit). The Third, Fifth, Ninth and Eleventh Circuits hold that the waiver is only as to factual issues unless the litigant was not informed of the necessity for objection or there was plain error.

I. The Split in the Circuits

There is a split in the circuits as to the consequences of failing to file an objection to the magistrate judge's report and recommendation as required by 28 U.S.C. § 636(b)(1)(C). The First, Second, Fourth, Sixth, Seventh and Tenth Circuits hold that the failure to file objections waives consideration on appeal of the issues to which neither party objects, sometimes indicating that the party must be informed that the failure to object constitutes a waiver of the right to appeal. *See Park Motor Mart, Inc. v. Ford Motor* Co., 616 F.2d 603, 605 (1st Cir. 1980) (a party may file objections to a magistrate's report within ten days, or he may not, as he chooses, but he "shall" do so if he wishes further consideration); *U.S. v. Guerrero*, 524 F.3d 5, 13 (1st Cir. 2008) (defendant's failure to object to magistrate's recommendation waives his right to raise issue on appeal); *Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital*, 415 F.3d 145, 148 (1st Cir. 2005) (municipality could not assert on appeal that contract issues are not subject to arbitration after failing to object to contrary recommendation by magistrate judge); *Davis v. Geren*, 272 Fed. Appx. 82,

82 (2d Cir. 2008) (plaintiff waived right to appeal summary judgment in favor of defendant by failing to timely object to magistrate's report and recommendation); *Hicks v. City of Buffalo*, 124 Fed. Appx. 20, 25 (2d Cir. 2004) (plaintiffs waive right to appeal summary judgment in favor of United States' on claim of negligent supervision and training, where they failed to file with the district court any objections to magistrate's finding that negligent supervision of police officers was not a cognizable claim); *U.S. v. Schronce*, 727 F.2d 91, 93-94 (4th Cir. 1984) (defendant barred challenging the magistrate's findings of fact and recommendations as approved by the district court because he failed to file written objections within the ten day period allotted by 636(b)(1)(C) – the Federal Magistrates Act cannot be interpreted to permit a party to ignore his right to file objections without imperiling his right to raise the objections in the court of appeals); *U.S. v. Benton*, 523 F.3d 424, 428-429 (4th Cir. 2008) (general objection to magistrate judge's findings not sufficient to preserve the issue for appeal because objection must be made with sufficient specificity reasonably to alert the district court of the ground of objection); *U.S. v. Midgette*, 478 F.3d 616, 621-622 (4th Cir. 2007) (party waives right to appellate review of particular issues by failing to file timely objections to magistrate's report and recommendation specifically directed to those issues)[3]; *Brown v. Berkeley County School District*, 339 F.Supp.2d 715,

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[3] A number of cases in the Fourth Circuit hold that a party's failure to object to an issue in a report and recommendation of the magistrate is accepted as agreement to the conclusions of the magistrate.

719 (D.S.C. 2004); *Kun v. Berkeley County Government*, 214 F.Supp.2d 559, 561 (D.S.C. 2001), aff'd. summarily, 32 Fed. Appx. 689 (4th Cir. 2002); *U.S. v. Walters*, 638 F.2d 947, 949-950 (6th Cir. 1981) (the fundamental congressional policy underlying the magistrate's act is best served by holding that a party shall file objections with the district court or else waive his right to appeal); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 595-596 (6th Cir. 2006) (failure to object to a specific issue within the magistrate's report and recommendation results in a waiver of an appeal on that individual issue); *U.S. v. Hall*, 462 F.3d 684, 688-689 (7th Cir. 2006) (failure to object to the recommendations and decisions of a magistrate judge results in waiver of appellate review); *Duffield v. Jackson*, 545 F.3d 1234, 1237-1238 (10th Cir. 2008) (the failure to timely object to a magistrate's recommendations waives appellate review on both factual and legal questions); and *Wardell v. Maggard*, 470 F.3d 954, 958-959 (10th Cir. 2006) (under the "firm waiver rule," a timely objection to the magistrate's recommendation is a condition for appellate review).

The Third, Fifth, Ninth and Eleventh Circuits hold that the failure to object under 28 U.S.C. § 636(b)(1)(C) waives only as to factual issues with an exception of no waiver where the party failing to object was not informed in plain terms of the need to object or if there was plain error or manifest injustice. *Donaldson v. U.S.*, 281 Fed. Appx. 75, 76 (3d Cir. 2008) (party failing to object to magistrate's recommendation does not waive his right to object in the court of appeals to the legal conclusions in the magistrate's recommendation, but does waive his right to plenary

review of the district court's order and review will be for plain error); *Nara v. Frank*, 488 F.3d 187, 194 (3d Cir. 2007) (same); *U.S. v. Arami*, 536 F.3d 479, 484 (5th Cir. 2008) (failure to object to magistrate's report and recommendation "simply means that this court employs the plain error standard of review."); *Douglass v. United Services Automobile Assoc.*, 79 F.3d 1415, 1428-1429 (5th Cir. 1996) (failure of a party to object to magistrate's recommendations bars that party except upon grounds of plain error from attacking on appeal the unobjected to proposed factual findings and legal conclusions provided that the party had been served with notice that such consequences will result from a failure to object); *FDIC v. Zook Brothers Constr. Co.*, 973 F.2d 1448, 1450 n.2 (9th Cir. 1992) (a failure to object to a magistrate judge's conclusions of law does not automatically bar raising the subject on appeal); *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991) (parties who do not object to a magistrate's report waive their right to challenge the magistrate's factual findings but retain their right to appeal the magistrate's conclusions of law); and *U.S. v. Hall*, 716 F.2d 826, 828-829 (11th Cir. 1983) (the failure to object does not waive the right to appeal, but limits the scope of appellate review of factual findings to a plain error review and no limitation of the review of legal conclusions results from failure to object).

The Eighth Circuit supports the view that a plaintiff has not waived his right to appeal a District Court order by failing to timely object to a magistrate's report and recommendation when the questions involved were questions of law or mixed questions of law and fact or when neither the local District Court

rule nor the magistrate's notice has clearly informed the plaintiff that failure to object to the magistrate's report would result in waiver of the right to appeal. *Lorin Corp. v. Gota & Co., Ltd.*, 700 F.2d 1202, 1205-1206 (8th Cir. 1983) (no waiver of any kind from failure to object to magistrate's recommendations); and *Taylor v. Farrier*, 910 F.2d 518, 520 (8th Cir. 1990) (same).

II. The *Arn* Opinion and The Sixth Circuit Rule

In *Thomas v. Arn*, 474 U.S. 140 (1985), this Court: (1) upheld the rule in the Sixth Circuit that a Court of Appeals may adopt a rule conditioning appeal from a district court's judgment that adopts a magistrate's recommendation upon the filing of objections to the magistrate's report identifying those issues on which further judicial action is desired without violating the Federal Magistrates Act, 28 U.S.C. § 636, or the Constitution; (2) this Court deliberately refrained from deciding whether 28 U.S.C. § 636(b)(1)(C) "mandates a waiver of appellate review absent objections" holding only that it "does not forbid such a rule" (474 U.S. at 148-149); and (3) the Court held that the statute does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection." (*Id.* at 149). In this context, this Court held that, "We are therefore not persuaded that the statute positively requires some lesser review [than *de novo*] by the district court when no objections are filed." (*Id.* at 150).

The petitioner in *Arn* argued that there was a distinction to be made between review of facts and

legal issues where there was no objection with no waiver of further judicial review of legal issues. This Court rejected the distinction, holding, "We reject, however, petitioner's distinction between factual and legal issues." (*Ibid.*).

The *Arn* opinion stops just short of requiring the Sixth Circuit absolute waiver rule to be adopted in all circuits. The Court's statement that, "It seems clear that Congress would not have wanted district judges to devote time to reviewing magistrate's reports except to the extent that such review is requested by the parties or otherwise necessitated by Article III of the Constitution." (474 U.S. at 474). Respectfully, the only way to prevent a violation of the intent of Congress is to impose a waiver of any further review of all issues not objected to by the parties. Otherwise, a party that is successful overall before the magistrate may for perceived tactical reasons not object to the issues lost with the idea that those issues can be raised on appeal if necessary. In the absence of the absolute waiver rule Petitioner seeks, such speculation is always possible.

Where the parties have not consented to a magistrate judge acting as the dispositive judge in their case, dispositive issues as to which a magistrate judge makes recommendations arise most often in the motion to dismiss and motions for summary judgment cases. A district judge knows that she must review every issue raised before the magistrate judge including those not objected to, because her decision on these motions will be subject to *de novo* review by the court of appeals unless there is a waiver of any further

review in the absence of specific objections. This Court's statement in *Arn* that it was certainly not the intent of Congress to require district judges to review issues the parties have not asked it to review can be effectual only if there is an absolute waiver in the absence of objections.

In *Arn*, this Court further noted that the language of 28 U.S.C. § 636(b)(1)(C) does not require any review at all by the district court or the appellate court of any issue that is not the subject of an objection to the magistrate's report. Those Circuits that do not impose an absolute waiver must write into the statutory language something that is not there. Applying the statutory interpretation doctrine of *expressio unius est exclusio alterius* to § 636(b)(1)(C), it is clear that by stating in specific detail one method of review, Congress intended to preclude others. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")

Respectfully, those Circuits that have in their opinions adopted rules that allow subsequent review in the absence of specific objections are simply writing something into 28 U.S.C. § 636(b)(1)(C) that is not there. Therefore, this Court should extend *Arn* to require waiver of all further review in the absence of specific objections.

III. Waiver and Appellate Review

The court of appeals in the instant case on its own initiative revived a ground to affirm the grant of a summary judgment that was not before the district court when she granted Respondents' motion for summary judgment. This Court held in *U.S. v. Raddatz*, 447 U.S. 667, 673 (1980), that the *de novo* review by a district judge of a magistrate's recommendations applied under the plain language of 28 U.S.C. § 636(b)(1)(C) only to those portions of the magistrate's recommendation to which objection had been made to the district court by a party. Further, this Court cited a report of the House Judiciary Committee, which added the *de novo* language to the statute that specifically stated that the district court's *de novo* review was limited to that judge giving "fresh consideration to those issues to which specific objection has been made by a party." (emphasis supplied) (*Id.* at 675, quoting H.R. Rep., at 3, U.S. Code Cong. & Admin. News 1976, p. 6163).

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990), the Court defined what is required to grant a summary judgment by stating that, "...the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment as set forth in Rule 56(c) is satisfied." (emphasis supplied). The same language appears in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The appellate standard for reviewing the grant of a summary judgment in the Eleventh Circuit is

plenary and the court of appeals applies "the same legal standards as those used in the district court." *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990). In *Title v. Jefferson County Commission*, 10 F.3d 1535, 1538 (11th Cir. 1994), the court held that, "On review, we are bound by the same standards that governed the district court on the summary judgment motion." (emphasis supplied).

The Eleventh Circuit opinion in the instant case took the position that it would reject the ground on which the district court granted the summary judgment, go past what was before the district court to an issue that the magistrate judge had considered and rejected, revive that issue, and use it to affirm the district court's summary judgment. The court relied on a rule that "the court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted, or rejected by the district court." *Nat'l R.R. Passenger Corp. v. Roundtree Transp. and Rigging*, 286 F.3d 1233, 1263 (11th Cir. 2002).

But, neither that case nor any of the precedents using this language has any application to the present facts where there is a statutory waiver of an issue. The rule relied on by the Eleventh Circuit would under the circumstances here turn the Magistrates Act on its head.

The provisions of 28 U.S.C. § 636(b)(1)(B) allow a district judge to appoint a magistrate judge to conduct hearings and submit to the district judge recommendations on dispositive pre-trial motions. The

magistrate sends out this recommendation to all parties who may file objections and get a *de novo* determination by the district judge "of those portions of the report or specified proposed findings or recommendations as to which objection is made." No other review method by the district court is provided for in the statute.

In 28 U.S.C. § 636(c)(3), the statute provides for a direct appeal to the court of appeals from a magistrate's order where both parties have agreed for the magistrate to enter dispositive orders. No other appeal of a magistrate judge's except contempt orders, is authorized to any court other than the district court. Where, as here, the parties did not consent for dispositive orders to be entered by a magistrate judge, the court of appeals had no jurisdiction of appeals from a magistrate judge's orders.

Yet, here, the Eleventh Circuit reached beyond the district court to the magistrate's recommendations and did what only the district court is authorized to do – it rejected the magistrate's recommendation and entered its own order without allowing the parties any opportunity to be heard on the matter. The court of appeals created its own jurisdiction and must be reversed.

In *Dandridge v. Williams*, 397 U.S. 471, 475-476 (1970), the case apparently relied on by the Eleventh Circuit as authority for the above rule, this Court decided that a prevailing party could "assert in a reviewing court any ground in support of his judgment whether or not that ground was relied upon or even

considered by the trial court." (*Id.* at 476 n.6). (*See Bonanni Supply, Inc. v. U.S.*, 959 F.2d 1558, 1561 (11th Cir. 1992) for reliance on the *Dandridge* case.)

Moreover, this Court has clearly stated that the general rule is that a prevailing party may defend the judgment on any ground decided or raised below. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) ("...a prevailing party may, of course, defend its judgment on any ground property raised below whether or not that ground was relied upon, rejected, or even considered by the District Court of Court of Appeals."). However, this Court added the caveat that the above rule would only apply where its application on the alternative ground "would neither expand nor contract the rights of either party established by the judgment below." (emphasis supplied) (*Ibid.*)

It is clear here that to allow the Eleventh Circuit to consider the waived issue of *res judicata* would expand the rights of Respondents by restoring to them the benefit of *de novo* review of the *res judicata issue* on appeal which they had lost and waived by their failure to comply with 28 U.S.C. § 636(b)(1)(C).

CONCLUSION

As this Court interprets 28 U.S.C. § 636(b)(1)(C) in *Arn*: "The statute does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection." (474 U.S. at 149).

This Court should now take the next step and require that the statute be interpreted to make the absolute waiver mandatory. Absent such a waiver, litigants would have no incentive to object to the magistrate judge's report and recommendation to the district court and any issue determined by the magistrate judge would be a proper subject of judicial review. The Magistrate's Act does not contemplate such an obviously inefficient use of judicial resources. It is clear that where there is no objection, there is no further judicial action allowed. That is the clear intent of Congress and it should be implemented.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15888
Non-Argument Calendar

D.C. Docket No. 08-00162-CV-2-IPJ

STEVEN GREEN, MARK PERSALL,
CHARLES HORTON, JAMES PHILLIPS,
CASSIE BELL, SHERRY J. AMICK,
WILLIAM V. ARNOLD, LYNN G. BASWELL,
PHILLIP A BAILEY, SAMUEL R. BEARD,
and all those similarly situated as related to
Jefferson County Resolution No. 2006-683
and District Court case 2:08-00162-IPJ,
Plaintiffs-Appellants

versus

JEFFERSON COUNTY COMMISSION,
GENERAL RETIREMENT SYSTEM FOR
EMPLOYEES OF JEFFERSON COUNTY,
ALABAMA, THE,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Alabama

(March 31, 2009)

Before HULL, PRYOR and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

In this case, Jefferson County employees challenge as unconstitutional and violative of federal law certain amendments made by the Jefferson County Commission to its retirement system. The district court dismissed the employees' claims, finding that (1) the claims constituted a *de facto* appeal from a previous state court judgment which rejected similar arguments and that, therefore, under the *Rooker-Feldman*[1] doctrine, the district court did not have jurisdiction to consider these claims; and 92) because the related state court judgment was on appeal to the Alabama Supreme Court, any ruling by the district court would be an "undue interference with state proceedings" and that, therefore, the district court must abstain from exercising its jurisdiction pursuant to the *Younger* doctrine.[2]

Both the *Rooker-Feldman* doctrine and the *Younger* doctrine are extremely narrow exceptions to the federal courts' "virtually unflagging" duty "to adjudicate claims within their jurisdiction." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (*"NOPSI"*). Upon review of the parties' briefs and the record, we

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[1] *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1986).

[2] *Younger v. Harris*, 401 U.S. 37 (1971).

conclude that neither of these limited exceptions to our jurisdiction applies. We conclude, however, that the doctrine of *res judicata*, as applicable through the Full Faith and Credit Clause, does require dismissal of this case. Accordingly, we AFFIRM the disposition, although on a different ground than that relied upon by the district court.[3]

BACKGROUND

The General Retirement System for Employees of Jefferson County, Alabama (the "Retirement System") was created in 1965 by an act of the Alabama legislature. It is funded by yearly contributions from the participating Jefferson County employees which are matched by yearly contributions from the County and by the income generated from the investment of those contributions. At some point during the 1970s, approximately 238 Jefferson County sheriff's deputies voluntarily withdrew from the Retirement System and removed their contributions, with interest.

In 2003, the Alabama Legislature approved a local law, Alabama Act 2003-343 (the "Act"), allowing Jefferson County employees who had previously withdrawn from the Retirement System to rejoin and "make up" for up to 20 years in which they did not contribute to or participate in the Retirement System. The Act also allowed Jefferson County employees who

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[3] "We may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

had not withdrawn to convert periods of unpaid service to paid service upon making an additional contribution to the Retirement System. The Act then required the County to contribute matching funds for any employee taking advantage of the Act and to pay any additional amounts necessary to make the Retirement System actuarially sound. In other words, the Act required the County to contribute additional funds to replicate investment earnings that would have occurred had the employees in question continually contributed to the Retirement System.

After the Act was passed, two groups of county employees filed suit in state court to establish the constitutionality of the Act and to force the County to implement it. Sheriff Deputy Jimmy Black brought one of the class-action lawsuits on behalf of all deputies who had opted out of the Retirement System and who were seeking to rejoin as allowed under the Act. Certain other Jefferson County employees also sought a hearing before a special master when the County did not allow them to convert unpaid service to paid service under the Act.

Employee-members who had not opted out of the Retirement System brought a separate lawsuit seeking to invalidate the Act. These cases were consolidated in the Jefferson County Circuit Court, with Black identified as the lead plaintiff ("Black"). In November of 2005, the *Black* court ruled that the Act, which created additional pension benefits for certain employees of Jefferson County was constitutional and due to be enforced (the "November 2005 order").

Thereafter, the court set deadlines for the County's compliance with the terms of the Act.

In an effort to offset the costs of funding the enhanced pension benefits mandated by the Act, the Jefferson County Commission passed Resolution No. 2006-683 on June 7, 2006 (the "Resolution"). The Resolution states that if a member of the Retirement System elects to take advantage of the additional pension benefits provided by the Act, he or she will no longer be eligible to receive the discretionary, non-pension benefits of retiree health insurance and sick leave retirement benefits. The County distributed the Resolution to persons eligible under the Act, giving them the opportunity to elect between (1) obtaining the Act's enhanced benefits and foregoing the non-pension benefits or (2) remaining eligible for retiree health insurance coverage and sick leave retirement benefits and foregoing the enhanced benefits available under the Act.

On June 19, 2006, the *Black* plaintiffs made a motion for supplemental relief before the Jefferson County Circuit Court, arguing that the Resolution "impermissibly impairs and impedes" the November 2005 Order, which instructed the County to implement the Act. Specifically, the *Black* plaintiffs argued that the Resolution discourages those entitled to enhanced benefits under the Act from electing to receive those benefits, impermissibly imposes additional burdens upon the exercise of the rights established under the Act, and frustrates the enforcement and implementation of the Act as ordered by the court. Accordingly, the plaintiffs asked the court to enjoin the

County from enforcing the Resolution as inconsistent with its Order to implement the Act.

The *Black* court held an evidentiary hearing on this motion for supplemental relief and, on September 14, 2006, it issued an order stating, in pertinent part:

> The Jefferson County Commission has been vested with the responsibility for maintaining a balanced budget for the County and funding and overseeing vital public services for the citizens of the County. In adopting the Resolution, the Commission did not abuse their vested discretion, and did not engage in fraud. This Court's inquiry must end there, as the authority to determine the appropriations necessary for the performance of government function is a legislative power, not a judicial power. This Court would infringe upon the boundaries between our State's branches of government delineated in Sec. 43 of the Alabama Constitution if it were to enjoin this Resolution. This Court also finds that the issues presented in Plaintiffs' challenge to the Resolution are completely separate and involve different facts, issues and theories than the previous action challenging Act 03-343. Thus, the Court finds that there is no justiciable issue involved in the Plaintiffs' Motion for Supplemental Relief. Therefore, it hereby ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Supplemental Relief is DENIED.

(citations omitted, emphasis added). The *Black* plaintiffs did not appeal the denial of their motion for supplemental relief. On November 17, 2006, the court certified its judgment in the *Black* litigation as final. Neither party appealed from this final judgment.

On May 18, 2007, six Jefferson County employees, including lead plaintiff Steven Green,[4] filed a class action lawsuit against the Retirement System and the County in the Circuit Court for Jefferson County, Alabama (*"Green I"*). The *Green I* plaintiffs sought to represent the class of "107 Jefferson County employees" who had elected to receive the additional pension benefits provided under the Act. They argued that, by adopting the Resolution, the County had retaliated against and treated the putative class unequally. Accordingly, the *Green I* plaintiffs sought a declaration that the Resolution was invalid, a permanent injunction preventing the operation of the Resolution was invalid, a permanent injunction preventing the operation of the Resolution, and damages measured by the value of the sick leave retirement credit and retiree health insurance they had been forced to forego by the Resolution. The County moved for summary judgment, arguing (1) that the plaintiffs' claims were barred by the doctrines of *res judicata* and collateral estoppel; (2) that Art. III, § 43, Ala. Const. 1901, prevented the trial court from hearing the plaintiffs' challenge to the Resolution; (3)

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[4] Throughout the state and federal suits at issue, the lead plaintiff is referred to as both "Steven Green" and "Steven Greene." For the sake of consistency, we refer to this plaintiff as "Steven Green."

that Alabama law does not recognize an equal-protection challenge; and (4) that the plaintiffs' claims are due to be dismissed because the plaintiffs did not present their claims to the Jefferson County Commission before commencing their action and, thereby, violated § 6-5-20 et seq., Ala. Code 1975.

On September 17, 2007, the *Green I* court issued a brief order stating, *in toto*:

> For the reasons stated therein, the defendants' motion for summary judgment is due to be GRANTED. Neither the named class representatives nor any member of the putative class may maintain the claims raised in the complaint.
> This action is therefore DISMISSED with prejudice, costs taxed as paid.

The *Green I* plaintiffs moved the trial judge to recuse himself and moved for a new trial or, in the alternative, to alter, amend, or vacate the judgment or for relief from judgment. The trial court denied these motions without comment. On November 1, 2007, the plaintiffs filed a notice of appeal with the Alabama Supreme Court.

On January 29, 2008, while *Green I* was pending on appeal before the Alabama Supreme Court, 104 Jefferson County employees, again led by Steven Green, filed the instant lawsuit against the Retirement System and Jefferson County Commission in the federal district court for the Northern District of Alabama (*"Green II"*). All six of the named plaintiffs

from *Green I* are plaintiffs in this litigation; 98 other employees are named as plaintiffs in *Green II*, all of whom elected to receive the additional pension benefits provided under the Act and were therefore members of the putative class in *Green I*. In their complaint, the *Green II* plaintiffs allege that, by adopting the Resolution, the defendants discriminated against them and violated their "procedural due process rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution" and "establish[ed] a policy of discriminating against them" in violation of the Public Health Services Act ("PHSA"), 42 U.S.C. § 300bb-1 to 8. Accordingly, the plaintiffs asset two causes of action: (1) for equitable relief pursuant to 42 U.S.C. § 300bb-7[5] and (2) for equitable relief and damages pursuant to 42 U.S.C. § 1983.

Defendants filed a motion to dismiss *Green II*. The district court referred the motion to a magistrate judge. After converting the motion to dismiss into a motion for summary judgment and allowing the parties to submit additional briefing, the magistrate judge issued a Report and Recommendation ("R&R"), recommending that the defendants' motion be granted. The R&R found that *res judicata* did not require dismissal, but (1) pursuant to the *Rooker-Feldman* doctrine, the district court had no jurisdiction to consider the claims brought by the six plaintiffs who

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[5] The PHSA provides individuals with a private cause of action for violations of its terms. 42 U.S.C. § 300bb-7 ("Any individual who is aggrieved by the failure of a State, political subdivision, or agency or instrumentality thereof, to comply with the requirements of this subchapter may bring an action for appropriate equitable relief.").

were a party to *Green I* and (2) the *Younger* doctrine required the court to abstain from exercising jurisdiction over the claims asserted by the remaining ninety-eight plaintiffs. Accordingly, the R&R suggested that summary judgment was appropriate as to all of the plaintiffs' claims.

The plaintiffs filed objections to the R&R, to which the defendants responded. On October 7, 2008, in a brief opinion, the district court adopted the R&R in full and granted summary judgment in favor of defendants. The plaintiffs timely filed their notice of appeal to this court.

On November 14, 2008, while this appeal was pending before this court, the Alabama Supreme Court affirmed the state trial court's grant of summary judgment in *Green I*. ____ So.2d ____, 2008 WL 4892051 (Ala. Nov. 14, 2008). The Alabama Supreme Court held that the decision in *Black* was on the merits such that the claims asserted in *Green I* were barred under the doctrine of *res judicata*. *Id.*

STANDARD OF REVIEW

We review dismissals for lack of subject matter jurisdiction *de novo*. *Barbour v. Haley*, 471. F.3d 1222, 1225 (11th Cir. 2006). We review a district court's decision to abstain from exercising its jurisdiction for an abuse of discretion. *31 Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003). An error of law constitutes an abuse of discretion. *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003)

(citing *United States v. Pruitt*, 174 F.3d 1215, 1219 (11th Cir. 1999)).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "We can affirm a judgment on any legal ground, regardless of the grounds addressed and relied upon by the district court." *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1235-36 (11th Cir. 2004).

DISCUSSION

On appeal, the plaintiffs argue that the district court erred in finding that *Rooker-Feldman* and *Younger* – which represent narrow exceptions to a district court's jurisdiction – divested the court of jurisdiction in this case. For the reasons stated herein, we agree. Nonetheless, we affirm the grant of summary judgment in this case because, based on the *res judicata* principles of Alabama law, the state court's final judgments in the related cases of *Black* and *Green I* preclude our consideration of the plaintiffs' claims.

A. *Rooker-Feldman* Doctrine

Generally speaking, the *Rooker-Feldman* doctrine recognizes that federal district courts do not have jurisdiction to act as appellate courts and precludes them from reviewing final state court decisions. The

underlying rational for this doctrine comes from two federal jurisdictional statutes: 28 U.S.C. § 1331 and 28 U.S.C. § 1257. First, section 1331 provides that federal district courts "shall have original jurisdiction of all civil actions arising" under federal law, but does not provide for appellate jurisdiction. 28 U.S.C. § 1331. Second, section 1257 provides for Supreme Court review of state court judgments when certain federal questions arise. 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari."). "Taken together, the *Rooker-Feldman* doctrine draws a 'negative inference' from section 1257: 'because Congress *only* provided for review of state court judgments by the Supreme Court, Congress therefore intended to preclude lower federal courts from exercising such review.'" *Nicholson v. Shafe*, Nos. 08-11426, 08-13058, ____ F.3d ____, 2009 WL 385579 at *4 (11th Cir. February 18, 2009) (quoting *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 21 (1st Cir. 2005)).

In the recent case of *Exxon Mobil*, the Supreme Court warned the lower courts that we have extended this narrow doctrine "far beyond the contours of the *Rooker* and *Feldman* cases." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The Court instructed that the doctrine is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those

judgments." *Id.* The Court further noted that *Rooker-Feldman* does not prohibit a "district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court." *Id.* at 293. Rather, "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Id.*

Having received the Supreme Court's guidance in *Exxon Mobil*, the Eleventh Circuit recently considered the application of *Rooker-Feldman* in *Nicholson*, ____ F.3d at ____. In *Nicholson*, we adopted the rule followed by several other circuits "that state proceedings have not ended for purposes of *Rooker-Feldman* when an appeal from the state court judgment remains pending at the time the plaintiff commences the federal court action that complains of injuries caused by the state court judgment and invites review and rejection of that judgment." *Id.* (citing *Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir. 2006), *Federacion de Maestros de Puerto Rico*, 410 F.3d at 17, *Dornheim v. Sholes*, 430 F.3d 919 (8th Cir. 2005)). We explained that "confining the scope of the *Rooker-Feldman* doctrine to instances where the state proceedings have ended, in line with both the *Rooker* and *Feldman* cases," heeds the Supreme Court's warning that the doctrine is limited and should be applied narrowly. *Id.* (citing *Exxon Mobil*, 544 U.S. at 283).

Applied here, the chronology of significant dates is as follows: the state court granted summary judgment in *Green I* on September 17, 2006; the *Green*

I plaintiffs appealed the grant of summary judgment to the Alabama Supreme Court on November 1, 2007; the *Green II* plaintiffs filed the instant federal action on January 29, 2008; and the Alabama Supreme Court affirmed the state trial court's ruling in *Green I* on November 14, 2008, nearly one year after the commencement of these federal proceedings. As such, because an appeal of *Green I* remained pending in the state court at the time the *Green II* plaintiffs filed the instant case, the state court proceedings had not ended for purposes of *Rooker-Feldman*, as clarified by *Exxon Mobil* and *Nicholson*. Accordingly, this case was not a *de facto* appeal from a final state court judgment and the *Rooker-Feldman* doctrine did not divest the federal district court of jurisdiction.

B. *Younger Abstention*

In *Younger v. Harris*, a federal plaintiff challenged the constitutionality of a state statute under which he was being prosecuted in state court as a defendant. 40 U.S. at 39. The Supreme Court, concluding that the state criminal proceeding offered a sufficient forum for the plaintiff to raise his constitutional defense, abstained from hearing the plaintiff's claim and stated the general rule that a federal district court must refrain from enjoining a pending criminal state court proceedings except under certain special circumstances. *Id.* at 53-54. Such abstention, the Supreme Court recognized, is required by "[o]ur Federalism[s]" notion of comity, that is, "a proper respect for state functions" and "the belief that the National Government will fare best if the States

and their institutions are left free to perform their separate functions in their separate ways." *Id.*

The abstention doctrine derived from *Younger* applies most often in cases involving pending state criminal prosecutions. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (rejecting challenge to state criminal justice system "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials"); *Luckey v. Miller*, 976, F.2d 673, 677-78 (11th Cir. 1992) (abstaining from an attempt to "restrain every indigent prosecution and contest every indigent conviction until the systemic improvements [plaintiffs] seek are in place"). Early on, the Court expanded *Younger* abstention to apply to pending civil proceedings that are "akin to a criminal prosecution," *see e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (nuisance statute), *Middlesex County Ethics Comm. v. Garden State Bar*, 457 U.S. 423, 432 (1982) (state bar disciplinary hearing), and, more recently, in strictly civil proceedings which implicate state courts' "important interests in administering certain aspects of their judicial systems." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-13 (1987) (requirement for the posting of bond pending appeal); *see Judice v. Vail*, 430 U.S. 327, 334 (1977) (state contempt process).

Even as the principles of *Younger* have expanded, however, the Supreme Court has made clear that the abstention doctrine is not triggered in a civil context unless the federal injunction requested would create an "undue interference with state proceedings." *NOPSI*, 491 U.S. at 359 (emphasis added). The

Younger doctrine, like the *Rooker-Feldman* doctrine, is "an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)). Accordingly, a district court should not lightly shirk its "virtually unflagging obligation to exercise the jurisdiction given [to it]." *Id.* at 818. In addition, the Supreme Court has instructed that *Younger* only applies where the state proceeding at issue involves "orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions ... it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *NOPSI*, 491 U.S. at 368 (emphasis added); *Wexler v. Lepore*, 385 F.3d 1336, 1338-39 (11th Cir. 2004) (holding that a pending state civil action does not require the federal court to abstain "unless the requested federal relief would result in meticulous and burdensome federal oversight of state court or court-like functions").

In this case, the district court, adopting the magistrate judge's R&R, found that *Younger* barred its consideration of the remaining 98 plaintiffs' claims, explaining that because *Green I* was pending before the Alabama Supreme Court at the time, "if this court were to grant the relief requested by the plaintiff, it would effectively bar any action taken by the state courts." Furthermore, the district court noted that "the proceedings most certainly implicate a number of important state interests." However, as the district

court itself noted, "The crux of the [*Green II*] complaint turns on the validity of a legislative enactment of the Jefferson County Commission, a political subdivision of the state, which affected discretionary employee benefits of government employees." Accordingly, it is clear that the plaintiffs in this case did not ask the district court to enjoin or otherwise interfere with the pending state court action; rather, they challenged a legislative act of the Jefferson County Commission under federal law while, at the same time, state law challenges to the same legislative act were pending on appeal with the Alabama Supreme Court. Nothing in *Younger* or in any of its progeny requires a district court to abstain under these circumstances. *See Wexler*, 385 F.3d at 1340 (noting that "generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction"). Accordingly, the district court erred and thereby abused its discretion in finding that *Younger* required abstention in this case.

C. *Res Judicata*

Although neither party challenges the district court's finding that *res judicata* does not apply in this case, we review *de novo* all portions of a district court's order granting summary judgment and may affirm on any legal ground. *See Nat'l R.R. Passenger Corp. v. Roundtree Transp. and Rigging*, 286 F.3d 1233, 1263 (11th Cir. 2002) (explaining that an appellate court may affirm the district court's grant of summary judgment "as long as the judgment entered is correct on any legal ground regardless of the grounds addressed,

adopted, or rejected by the district court") (internal quotation and citation omitted). After reviewing this case and the related state court cases of *Black* and *Green I* – including the Alabama Supreme Court's recent decision in *Green I* – we conclude that, as a matter of law, consideration of this case is precluded by the state courts' judgments in *Black* and *Green I* under the doctrine of *res judicata*.

When we are considering whether to give *res judicata* effect to a state court judgment, we "must apply the *res judicata* principles of the law of the state whose decision is set up as a bar to further litigation." *Kizzire v. Baptist Health System, Inc.*, 441 F.3d 1306, 1308-09 (11th Cir. 2006) (citing *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 785 F.2d 1486, 1509 (11th Cir. 1985)). Accordingly, in this case, Alabama's *res judicata* principles apply. Under Alabama law, "the essential elements of *res judicata* are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." *Equity Res. Mgmt., Inc. v. Vinson*, 723 So.2d 634, 636 (Ala. 1998). If all four elements are met, any claim that was, or could have been, adjudicated in the prior action is barred from future litigation. *Id.*

When the Alabama Supreme Court ruled on the appeal in *Green I*, it considered whether the decision in *Black* barred the claims asserted by the plaintiffs in *Green* I. In considering this issue, the Court addressed the four elements of *res judicata*. First, the Alabama Supreme Court ruled that the *Black* court's

"denial of the motion for supplemental relief was a final judgment on the merits for *res judicata* purposes." *Green I*, 2008 WL 4890251 at *5. Second, it ruled that this final judgment "was a decision rendered by a court of competent jurisdiction." *Id.* at *7. Third, the Alabama Supreme Court found that the "parties in the *Black* litigation are substantially identical to the parties involved in [*Green I*]." *Id.* at *8. The Court explained that under Alabama law, "[a] person may be bound by a judgment even though not a party to a suit if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Id.* (citing *Gonzalez, LLC v. DiVincenti*, 844 So.2d 1196, 1203 (Ala. 2002)). Applying this rule, the Court found that

> [i]n the *Black* litigation, the subclass of Jefferson County deputies and the subclass of Jefferson County employees had an identical interest in seeking the invalidation of the resolution because, under the terms of the resolution, members of both subclasses would have been required to forfeit certain discretionary benefits in order to opt back into the retirement system.

Therefore, even though the *Green I* plaintiffs were not named plaintiffs in *Black*, the Alabama Supreme Court found that the third element of *res judicata* was met because the parties in *Green I* had "identical interests" as the parties involved in the *Black* litigation. *Id.*

Finally, addressing the fourth element of *res judicata*, the Court found that the same cause of action was presented in both *Black* and *Green I*. It reasoned that "*[r]es judicata* applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts." *Id.* (citing *Old Republic Ins. Co. v. Lanier*, 790 So.2d 922, 928 (Ala. 2000)) (emphasis in original). Two causes of action are the same for *res judicata* purposes "when the same evidence is applicable in both actions." *Id.* (citing *Old Republic Ins. Co.*, 790 So.2d at 928). Because the *Green I* plaintiffs sought "a judgment declaring that the sole purpose of the resolution is to punish Jefferson County employees who convert unpaid service to paid service under the Act and a permanent injunction to prevent the County from enforcing the resolution" and the plaintiffs in the *Black* litigation "likewise sought to enjoin the County from enforcing the resolution," the Court found "the claims in the two cases arise out of the same nucleus of operative facts." *Id.* at *9. Additionally, the Court noted that the *Green I* plaintiffs, in seeking to prevent the County from enforcing the Resolution, "rely on the same evidence and advance many of the same arguments raised in the plaintiffs' motion for supplemental relief in the *Black* litigation." *Id.* Accordingly, the Court found that the final element of *res judicata* was met because the cause of action asserted in *Green I* was the same cause of action raised in *Black*. For these reasons, the Alabama Supreme Court concluded that the claims raised by the *Green I* plaintiffs were barred and it affirmed the state trial court's judgment. *Id.*

Applying the decision in *Green I* to the case before us, we must conclude that the Alabama Supreme Court would find that the claims asserted by the *Green II* plaintiffs are also barred under the doctrine of *res judicata*. Regarding the first and second elements of the doctrine, we are bound by the Alabama Supreme Court's finding that *Black* was a final judgment on the merits rendered by a court of competent jurisdiction. *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 348 (2005) (holding that a plaintiff is precluded by the full faith and credit statute, 28 U.S.C. § 1738, from relitigating those issues which were adjudicated by a state court). Similarly, following the Alabama Supreme Court's guidance, we must also conclude that the plaintiffs in the case before us – 104 Jefferson County employees who elected to receive the additional pension benefits provided under the Act – are "substantially identical" to the plaintiffs involved in both the *Black* and *Green I* actions.[6] This is so because the plaintiffs in all three cases share an identical interest in "seeking the invalidation of the resolution because ... [they all] would have been required to forfeit certain discretionary benefits in order to opt back into the retirement system." *Green I* at *8. This shared interest makes these parties "substantially identical" for purposes of preclusion under Alabama law. *Id.*

The only remaining question, therefore, is whether the causes of action in *Black* and *Green I* are

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[6] As we noted above, six of the *Green II* plaintiffs are the same as the named *Green I* plaintiffs; the remaining *Green II* plaintiffs are members of the putative class named in *Green I*.

identical to the causes of action asserted in the case at bar. Clearly, the plaintiffs in *Black* and *Green I* did not assert causes of action pursuant to 42 U.S.C. § 1983 and the PHSA; however, the Alabama Supreme Court has explained that, regardless of the "exact legal theory" advanced in the prior case, claims are "identical" for purposes of *res judicata* if they "aris[e] out of the same nucleus of operative facts" and if "the same evidence is applicable in both actions." *Id.* In this case, the plaintiffs – like the plaintiffs in *Green I* – sought a permanent injunction of the enforcement of the Resolution and damages measured by the value of the sick leave retirement credit and retiree health insurance. Following the Alabama Supreme Court's recent decision, we must conclude that because the relief sought is identical, the "claims in the two cases arise out of the same nucleus of operative facts." Additionally, a review of the plaintiffs' complaint shows that, in seeking to prevent the County from enforcing the Resolution, the plaintiffs rely on the same evidence and advance many of the same arguments raised by both the *Black* and *Green I* plaintiffs. Therefore, we conclude that the final element of *res judicata* is met.

Applying Alabama preclusion law, as described by the Alabama Supreme Court in *Green I*, we conclude that there was a prior final judgment on the merits in the *Black* litigation, that the judgment was rendered by a court of competent jurisdiction, that the parties in the *Black* litigation, the *Green I* litigation, and this action are substantially identical, and that the cause of action was the same in all three disputes. Thus, the

four elements of *res judicata* are met and the claims raised by the plaintiffs are barred as a matter of law.

Accordingly, we AFFIRM the district court's grant of summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STEVEN GREEN, et al.,
Plaintiffs,

v. CASE NO.: CV-2008-00162

JEFFERSON COUNTY COMMISSION and
THE GENERAL RETIREMENT SYSTEM
FOR EMPLOYEES OF JEFFERSON COUNTY,
ALABAMA,
Defendants.

ORDER

This case comes before the court on the motion to dismiss (converted to a motion for summary judgment) filed by the Jefferson County Commission, and The General Retirement System For Employees of Jefferson County, Alabama (doc. 4). In accordance with the memorandum opinion entered contemporaneously herewith, it is ORDERED, ADJUDGED, and DECREED that the defendants' motion for summary judgment is GRANTED and this action is DISMISSED WITH PREJUDICE.

DONE and ORDERED this the 7th day of October 2008.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STEVEN GREEN, et al.,
Plaintiffs,

v. CASE NO.: CV-2008-00162

JEFFERSON COUNTY COMMISSION and
THE GENERAL RETIREMENT SYSTEM
FOR EMPLOYEES OF JEFFERSON COUNTY,
ALABAMA,
Defendants.

Memorandum Opinion

This case comes before the court on the motion to dismiss (converted to a motion for summary judgment) filed by the Jefferson County Commission, and The General Retirement System For Employees of Jefferson County, Alabama (doc. 4). On September 11, 2008, the magistrate issued a report and recommendation wherein it was recommended that the motion be granted and this case be dismissed. (Doc. 16.) The plaintiffs have filed objections to the recommendation (doc. 17), and the defendants have filed a response to the objections (doc. 19).

Having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation, the objections thereto, and the response to the objections, the Court is of the opinion that the magistrate judge's report is due to be and is

hereby ADOPTED and his recommendation is ACCEPTED. The Court EXPRESSLY FINDS that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law. Accordingly, the defendants' motion for summary judgment is due to be GRANTED and this action is due to be DISMISSED WITH PREJUDICE. A final judgment will be entered.

DONE this the 7th day of October 2008.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STEVEN GREEN, et al.,
Plaintiffs,

v. CIVIL ACTION NO.: CV-2008-00162

JEFFERSON COUNTY COMMISSION and
THE GENERAL RETIREMENT SYSTEM
FOR EMPLOYEES OF JEFFERSON COUNTY,
ALABAMA,
Defendants.

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE FILED SEPTEMBER 11, 2008

The Report and Recommendation ("Report") recommends that this case be dismissed based on a summary judgment for the defendants holding the "*Rooker-Feldman* Doctrine" and based on the Court's discretion under the "*Younger* Abstention Doctrine." The plaintiffs object to both of these grounds for dismissal because the proper summary judgment procedures were not followed by the Magistrate, the "*Rooker-Feldman* Doctrine" is no longer viable, and the "*Younger* Abstention Doctrine" does not apply.

PROPER SUMMARY JUDGMENT PROCEDURES WERE NOT FOLLOWED

The standard for deciding a Rule 12(b)(6), *Fed.R.Civ.P.*, motion to dismiss is different from the standard for deciding a Rule 56, *Fed.R.Civ.P.*, motion for summary judgment. See, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000):

> In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole."
> ***
> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence , and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." (internal citations omitted).

Compare, *Bell Atlantic Corporation v. Twombly*, _____ U.S. _____, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007) (A complaint may not be dismissed if it states enough facts to state a claim to relief that is "plausible" on its face with the court assuming all allegations in the complaint are true and granting plaintiff all reasonable inferences therefrom.). See also, *Erickson v. Pardus*, _____ U.S. _____, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), holding that "specific facts" need not be pleaded.

Defendants filed a document styled as a motion to dismiss plaintiffs' complaint. (Doc. 4). Defendants filed with this motion to dismiss a number of allegedly supporting papers on which they relied to support the motion to dismiss. Plaintiffs filed a motion to convert the Rule 12(b)(6), *Fed.R.Civ.P.*, to a summary judgment under Rule 56, *Fed.R.Civ.P.*, based on Rule 12's mandate to do so where the motion is supported by papers extraneous to the pleadings. The Magistrate granted this motion. (Doc. 10).

A Rule 56 hearing must be decided under Rule 56 standards and not Rule 12(b)(6) standards. It is apparent from the above cases that Rule 12(b)(6) is pleading based and Rule 56 is fact and law based. The Magistrate in his July 2, 2008 Order (Doc. 10) restricted plaintiffs to matters and arguments already made in response to that Rule 12(b) motion in making plaintiffs' response to the resulting Rule 56 motion. Plaintiffs were not allowed by the Magistrate to effectively respond to the Rule 56 motion after the Magistrate's order to treat the motion to dismiss as a motion for summary judgment. The Defendants were

not required by the Magistrate to file the Rule 56 motion in proper form as required by this Court in its standing order on the form of summary judgment motions.. (See Appendix II to ALND Uniform Initial Order Governing All Further Proceedings). This standing order is by its stated terms mandatory for all summary judgment motions. There is no exception for those that are converted from motions to dismiss. Yet, the Magistrate simply disregarded this Court's standing order and allowed the motion to dismiss to proceed as a summary judgment motion without any changes or amendments to stand as the summary judgment motion.

The basis for conversion of a motion to dismiss is that once the proponent of the motion decides to go outside the pleadings, the motion to dismiss format of a motion attacking a pleading alone no longer applies if the Court elects to consider the matters outside the pleading. For example, no list of undisputed material of facts on which the movant relies is set out in the motion to dismiss, but must be set out in the summary judgment. Otherwise, there is no means of telling whether the movant has met its summary judgment burden requiring the non-movant to rebut the alleged undisputed facts.

The Magistrate made the following statement in Doc. 10:

> In this case, the only documents considered by the undersigned are certified copies of pleadings from the prior court proceedings. Their authenticity has not been

> challenged and no party can reasonably dispute their existence or the matters discussed therein. These documents outline the nature of the cases below. No discovery is needed to resolve these issues. Counsel already has in their possession the documents necessary to resolve this issue. However, in the interest of caution, the court gives notice that it is converting the motions to motions for summary judgment, and will rule on these motions within 11 days of the date of this order. Prior to that time, plaintiffs may file a supplementary opposition to the motions to dismiss, not to exceed 5 pages in length, and attach any exhibits they wish to use *to support the arguments and brief that they have already filed*. New arguments will not be considered by the court without good cause first being shown. (italic emphasis original; underlined emphasis added).

As a result of this statement, particularly the underlined portion, plaintiffs made a motion to recuse the Magistrate because it was obvious that he had made up his mind as to how to rule without seeing plaintiffs' summary judgment response.[1] Moreover, the Magistrate's restrictions on plaintiffs' allowable response to the converted summary judgment motion

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[1] The Magistrate misunderstood the motion to recuse as based on some personal prejudice when it was actually based on him making up his mind as to how to rule before seeing plaintiffs' summary judgment response.

violated Rule 56, *Fed.R.Civ.P.* Plaintiffs moved to be allowed to present a less restrictive response.

Judge Coogler denied plaintiffs' motions on July 29, 2008 (Doc. 13), following a "rebuttal" order filed by the Magistrate on July 28, 2008 (Doc. 12). The Magistrate stated in this order:

> The reason for the restriction in the order to which the plaintiffs object, which restriction applies to both the plaintiffs and the defendants, is that the court did not see the necessity of of expanding the *issues* solely because the motion to dismiss had to be converted to a motion for summary judgment if the documents submitted by the defendants, and to which no objections were made by the plaintiffs, were to be considered. It was believed, however, that the documents presented were sufficient for the summary judgment determination, for the reasons stated in the July 2 order, but, in "an abundance of caution," the order gave the parties the opportunity to present additional evidence that might bear on the *arguments already set out* by the parties in the motion to dismiss. If, however, there was a need to present additional *legal argument*, the order expressly provided that all the parties needed to do was show good cause and additional argument, either by the defendants to attack the plaintiffs' claims or by the plaintiffs to defend them, would be allowed. Clearly, there was no intent to change the rules of

> civil procedure. Clearly, this order contains not even an indication of bias toward or against either party. It is hereby stated that there is in fact no bias on the part of the undersigned toward or against any party.[2]

Plaintiffs had no opportunity to file objections to the July 28 order because Judge Proctor ruled on plaintiffs' motions the day after it was filed. However, in reliance on the Magistrate's statement in Doc. 12 that plaintiffs could show cause and file a more extensive response, plaintiffs filed a 28 page memorandum of law which began with an explanation of why plaintiffs' counsel deemed it necessary. (Doc. 14). Nevertheless, the Magistrate ordered it struck based solely on its length. (Doc. 15).

Plaintiffs objected to these orders in Docs. 10 and 12 and pray that the Court will reverse them and order that this summary judgment be handled in accordance with this Court's standing summary judgment order and Rule 56, *Fed.R.Civ.P.*

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[2]If, theoretically, there ever were any bias, no party would have to ask for re-assignment. The undersigned would take that action on his own. (italic emphasis original; bold emphasis added).

THE *ROOKER-FELDMAN* DOCTRINE IS DEAD

The Magistrate Judge has, without reference to United States Supreme Court cases clearly stating that the so-called *Rooker-Feldman* doctrine is not viable, made a determination that the *Rooker-Feldman* doctrine applies to and controls this case. (Report at 7-13). In an effort to cut through the reasoning employed by the Magistrate in making this finding, the short answer is that the *Rooker-Feldman* doctrine is no longer a viable doctrine under federal law.

In *Marshall v. Marshall*, 547 U.S. 293, 312, 315, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006). The *Marshall* court held that a ruling of the Texas Probate Court that it had exclusive jurisdiction over all of a widow's claims against her stepson could not deprive a federal court of jurisdiction over the widow's tort claim against her stepson asserted in her bankruptcy proceeding. The court held that the tort claim did not involve the administration of an estate or other purely probate matter so that the federal bankruptcy court had jurisdiction despite the ruling of the Texas courts. Justice Stevens in a concurring opinion clearly stated that the *Rooker-Feldman* doctrine is dead in the following language: "Rather than preserving whatever vitality that the 'exception' has retained as a result of the *Markham* dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the *Rooker-Feldman* doctrine."

Justice Stevens cited for the demise of *Rooker-Feldman* the case of *Lance v. Dennis*, 546 U.S. 459

463, 464, 126, S.Ct. 1198, 1204, 163 L.Ed.2d 1059 (2006). In *Lance*, registered voters filed an action in the United States District Court challenging the Colorado Supreme Court's decision in a separate case which invalidated the state legislature's redistricting plan and ordered use of a redistricting plan created by state courts. A three judge panel granted the motion to dismiss holding that the *Rooker-Feldman* doctrine deprived the federal district court of jurisdiction over the voters' action. The U.S. Supreme Court reversed and destroyed what was left of the *Rooker-Feldman* doctrine. The court noted several times that the *Rooker-Feldman* doctrine had always been narrowly construed. (546 U.S. at 464). The court refused to dismiss the federal court case seeking a different result than had been rendered in the Colorado Supreme Court decision regarding which voting plan, legislative or state court, would be followed. The court rejected the state's preclusion law as barring the federal court suit and refused to dismiss the action because the plaintiffs in the federal action were in privity with those in the state action.

In *Verizon MD, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 644 n.3, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), the court held that *Rooker-Feldman* doctrine has no application to judicial review of executive action including determinations made by a state administrative agency. Of course, as pointed out below, that is what all Alabama counties are state agencies.

In *Exxon Mobile Corporation v. Saudi Basic Industries Corporation*, 544 U.S. 280, 292, 125 S.Ct.

1517, 161 L.Ed.2d 454 (2005), the court held that the *Rooker-Feldman* doctrine does not apply to parallel state and federal litigation. The court noted that the only time the *Rooker-Feldman* doctrine had been applied by the Supreme Court was in *Rooker* and *Feldman*. (544 U.S. at 283).

It is not clear that even if *Rooker-Feldman* was not a dead doctrine that it could be held to apply without a consideration of the facts of the case. Any Court would be required to analyze those facts to reach a conclusion. Defendants have not shown, or attempted to show, that there is no genuine issue of material fact in this case.

The foregoing cases were ignored by the Magistrate Judge. Instead of applying this simple solution that the *Rooker-Feldman* Doctrine is dead, the Magistrate Judge considers such questions as whether, "The doctrine applies to claims actually raised in state court and to claims that were not made in state court but are 'inextricably intertwined' with the state court judgment, so long as the plaintiff had a reasonable opportunity to raise the claim in state court proceedings." (Report at 7).

The Magistrate Judge ignored the above United States Supreme Court decision, opting instead to cite *In re Slizyk*, 278 Fed.Appx. 946 (11th Cir. 2008), which involved the appeal of a Chapter 7 bankruptcy debtor from an opinion that a debt to the bankrupt's ex-husband was not dischargeable in bankruptcy because of the fact that the bankrupt was seeking review of a state court judgment. This case is interesting because

there is a specific provision of the Bankruptcy Code which governs the dischargeability of previously awarded divorce decrees, all of which are necessarily from state courts. (11 U.S.C. § 523(a)(15)). There are rules governing the consideration by the bankruptcy court as to whether discharge the state court debt See, *e.g.*, *In re Bowers*, 357 B.R. 663, 667-68 (Bankr. M.D. Fla. 2006). It is true that *Slizyk*, citing *Powell v. Powell*, 80 F.3d 464, 466-67 (11th Cir. 1996), held that the *Rooker-Feldman* Doctrine barred consideration of a dispute by the bankrupt of a debt the divorce decree ordered the bankrupt to pay to his mother. However, *Slizyk* was not selected for publication in the Federal Reporter. Such cases are not binding precedent for decisions in other cases in the Eleventh Circuit. See Rule 32.1, Fed.R.App.P., and Eleventh Circuit Rules 36-2 and 36-3. *Powell* was also a case in which a district court was asked to review a divorce proceeding from state court.

The question before this Court is whether to apply *Marshall* and *Lance* or to try to pump blood into the *Rooker-Feldman* Doctrine by enforcing it in this case in the hope that it will somehow cause the corpse to rise from the grave to which Justice Stevens consigned it in the *Marshall* case citing *Lance*.

Moreover, even if the *Rooker-Feldman Doctrine* has viability, which it does not, the present case is not a case seeking to review a state court judgment. The state court judgment referred to by the defendants is on direct appeal to the Alabama Supreme Court. As correctly pointed out by the Magistrate Judge, the plaintiffs in this case are not plaintiffs in the state

court case with the exception of Steven Green, Mark Pursall, Larry Owen, Charles Horton, James Phillips, and Cassie Bell.

The Magistrate Judge made the incorrect statement that in *Green 1*, "the denial of the motion to alter, amend, or vacate on October 23, 2007 was also a final judgment on the merits of the claim that the Resolution was invalid." (Report at 12) In footnote 4 on page 12 of the Report, the Magistrate Judge makes the incorrect statement, "The validity of the Resolution was adjudicated in *Green 1*. In the motion to alter, amend, or vacate, the plaintiffs made constitutional claims." This is simply incorrect.

DEFENDANTS ARE JUDICIALLY ESTOPPED

Defendants recognize, as they must, that Judge Fielding's ruling that the motion for supplementary relief, seeking a preliminary injunction, was not properly before Judge Fielding and is thus not a ruling on the merits of anything. Defendants successfully argued to Judge Fielding that the Fielding plaintiffs' motion for supplemental relief was not justiciable because it was not properly before him.

Defendants now try to change this position by claiming the Fielding plaintiffs who filed the motion for supplemental relief changed their prayer to one for a permanent injunction and that Judge Fielding actually denied a permanent injunction. (Def's Brief at 31-34). This argument is frivolous. The Fielding plaintiffs only suggested, unsuccessfully, that the hearing on the merits be consolidated with the hearing

on the preliminary injunction. Judge Fielding did not rule on this suggestion. After Defendants argued the Fielding plaintiffs were not entitled to a preliminary injunction as requested in their motion for supplemental relief, those plaintiffs responded, "The [plaintiffs] stand on the showing in their motion for supplemental relief." (CR 180). Alternatively, the Fielding plaintiffs pointed out to Judge Fielding that he "could consolidate the hearing on the preliminary injunction with the trial on the permanent injunction under *Ala.R.Civ.P.* 65(a)(2)...". (CR 180). Judge Fielding did not do this. Instead, he found that the motion for supplemental relief was not properly before him and was not justiciable. (CR 91). Any suggestion that this unsuccessful attempt to consolidate the hearings amounted to a ruling denying a permanent injunction is frivolous.

THE *YOUNGER* DOCTRINE IS NOT APPLICABLE

The Magistrate Judge determined that the *Younger* abstention doctrine applied in this case, citing *31 Foster Children v. Bush,* 329 F.3d 1255, 1274-1277 (11th Cir. 2003), which relies primarily on *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2514, 73 L.Ed.2d 116 (1982). This Court held that all three of the factors listed in *Middlesex* for *Younger* abstention required the Magistrate to abstain from exercise jurisdiction over the claims stated in this case. The stated reasons by the Magistrate Judge are that if this Court were to grant the relief requested by the plaintiffs, it would bar any action taken by the state

court; the proceedings most certainly implicate a number of important state issues, citing the requirement that the county maintain a balanced budget in *Ala. Code*, 1975, § 11-8-3; and Alabama has concurrent jurisdiction over § 1983 claims and properly pled federal constitution claims. (Report at 14-18).

In *Wexler v. LaPore*, 385 F.3d 1336, 1340-1341 (11th Cir. 2004), the court discussed the *Younger* doctrine and its limitations. First, the court pointed out that, "We recently wrote that 'generally, as between state and federal court, the rule is that the pendency of an action in the state court is no bar to proceeding concerning the same matter in the Federal court having jurisdiction.'" (385 F.3d at 1340) (citing *Ambrosia Coal & Construction Company v. Morales*, 368 F.3d 1320, 1328 (11th Cir. 2004)).

The court further held that, "Second, we have found no binding precedent requiring federal plaintiffs to raise federal claims in pending state court proceedings where they are also plaintiffs." (385 F.3d at 1340).

The court next pointed out that, "Third, we do not accept that the existence of a parallel state court action would warrant abstention in federal court, unless the requested federal relief would result in meticulous and burdensome federal oversight of state court or court-like functions." (Id.)..

Finally, the *Wexler* court held that even where the federal court's disposition of a case might affect "or for practical purposes preempt" a future or pending state

court case, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal court." (*Id.* at 1341).

It should be clear from the foregoing decision that the *Younger* abstention doctrine does not apply in this case.

CONCLUSION

Plaintiffs object to the Report and pray that this Court will reject the Magistrate's Report and set this case for further proceedings leading to a trial. Alternatively, plaintiffs pray this Court will reject the Magistrate's Report and order that the summary judgment motion be handled in accordance with this Court's standing order on summary judgment procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of September, 2008, electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

STEVEN GREEN, et al.,
Plaintiffs,

v. CASE NO.: CV-2008-00162

JEFFERSON COUNTY COMMISSION and THE GENERAL RETIREMENT SYSTEM FOR EMPLOYEES OF JEFFERSON COUNTY, ALABAMA,
Defendants.

REPORT AND RECOMMENDATION

This is a civil case filed by multiple plaintiffs against the defendants, the Jefferson County Commission and The General Retirement System for Employees of Jefferson County, Alabama. This case comes before the court on the motion to dismiss filed by the Jefferson County Commission, and The General Retirement system for Employees of Jefferson County, Alabama (doc. 4).

Standard of Review

Because the Court, in reviewing the instant motion, has considered evidence which the parties have submitted, the instant motion is converted to one for summary judgment under Fed.R.Civ.P. 12(B). *See Day v. Taylor*:, 400 F.3d 1272, 1275-1276 (11th Cir.

2005)("the district court generally must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint.")[1]

> In conducting (a summary judgment analysis), [the Court must] view all evidence and factual inferences in the light most favorable to the nonmoving party. Summary judgment is proper where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.CT. 2505, 2510, 91 L.ED. 2d 202 (1986). Only factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment. *Id.*

Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804, 809 (11th Cir. 2004).

Statement of Facts

In 2003, the Alabama Legislature approved a local law, Alabama Act 2003-343, that allowed certain county employees to make up for the years that they

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[1] This motion, and court document 6, were converted in the order of July 2, 2009. (Doc. 10). The plaintiff was given adequate time to present evidence in opposition to the motions.

did not participate in the General Retirement System for employees of Jefferson County, Alabama (the "Retirement System"). Twenty was the maximum number of years those employees were allowed to make up.

The Retirement System is funded by matching contributions by the employee and the County, and by the income from the investment of those contributions. Act 03-343 required the County and its taxpayers, and any employees seeking this benefit, to share certain costs, while the County was given the financial duty to make the effects of the Act "actuarially sound." That is, the County had to contribute additional funds to replicate investment earnings that never occurred during those years that the employees in question were not contributing to the requirement Systems.

In response, the County Commission adopted Jefferson County Resolution No. 2006-683 (hereinafter the "Resolution") on June 7, 2006. The Resolution provided that any person who elected to obtain the enhanced pension benefits under the Act would not be entitled to two types of discretionary, non-pension benefits: (a) retiree health care coverage and (b) sick leave retirement benefits. No state law required that these benefits be provided, and there is no provision that vests employees with these benefits. The County distributed the Resolution to persons eligible under the Act before they elected whether they wanted to obtain the enhanced pension benefits provided by the Act or whether they wanted to remain eligible for retiree health coverage and sick leave retirement benefits.

A. History of the Two Prior State Court Challenges to the Resolution

1. *Green I*

On May 18, 2007, Steven Green, Mark Persall, Larry Owen, Charles Horton, James Phillips and Cassie Bell filed a class action in the Circuit Court for Jefferson County, Alabama against the Retirement System and the County (collectively "Defendants"). (*Green I* Compl.) Because Steven Green is also the lead plaintiff in the case before this court, the earlier Jefferson County proceeding shall be referred to as *"Green I."*

The plaintiffs in *Greene I* specifically sought a declaratory judgment enjoining the Resolution in its entirety, as well as an injunction preventing the operation of the resolution. (*Green I* Complaint 12). In that complaint, plaintiffs Steven Greene, Mark Persall, Charles Horton, and James Phillips identified the dollar value of the sick leave retirement credit that they had to forego due to the Resolution, and they supplied detailed information regarding the cost of their health care coverage. *Id.* at §§ 29-32. Their request for damages sought "reimbursement of sick leave/wellness leave" time and pay for same. *Id.* at 12. The *Green I* plaintiffs sought to represent the following class of individuals: "Jefferson County employees who have been subjected to one or more aspects of the systematic retaliation and/or administered unequal treatment by the enactment of the Resolution." *Id.*, at ¶9 (emphasis added). The size of the class was identified as "107 Jefferson County employees." *Id.* at

¶11. The defendants moved for summary judgment, which was granted by Circuit Judge Robert Vance after full briefing by the parties. On September 17, 2007, the trial court entered the following order:

> For the reasons stated therein, the defendants' motion for summary judgment is due to be GRANTED. Neither the named class representatives nor any members of the putative class may maintain the claims raised in the complaint.
>
> This action is therefore DISMISSED with prejudice, costs taxed as paid.

(*Greene I* Sum. Judg. Order).

The plaintiffs in *Green I* filed a Motion for New Trial to Alter, Amend or Vacate Judgment and for Relief from Judgment. (*Greene I* Mot. New Tr. 1). This motion included the following language:

> Moreover the resolution of the Jefferson County Commission at issue is based upon an irrational and unconstitutional classification of employees and retirees by providing different benefits to retirees who do and who do not take advantage of the opportunities provided to them in the said statute, providing less benefits to those who act pursuant to the statute. The creation of this irrational classification resulting in a loss of benefits to Plaintiffs violates the Alabama

> and United States Constitutions and must be set aside.

Id. at 2. After a hearing, the trial court denied this motion, without comment, on October 23, 2007. (*Greene I* Order, October 23, 2007.) The plaintiffs in *Greene I* thereafter filed a notice of appeal to the Alabama Supreme Court on November 1, 2007. They did not obtain a stay of the trial court's judgment, and did not file a supersedeas bond. The appeal is still pending.

2. *The Black Litigation*

When Act 03-343 was enacted, various lawsuits were filed in 2003 concerning is constitutionality, including in the Jefferson County Circuit Court.[2] Those cases were consolidated with Jimmy Black identified as the lead plaintiff. The cases were assigned to Circuit Judge Jerry L. Fielding. The Resolution was passed while the *Black* Litigation was pending. On June 19, 2006, seven months after Judge Fielding had ruled the Act to be constitutional, the employees seeking benefits under the *Act* in the same case challenged the *Resolution*. Judge Fielding held an evidentiary hearing on this challenge, and, on September 14, 2006, wrote, in pertinent part:

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[2] As opposed to the legality of the *Resolution* which was the issue in *Greene I*. Although it is not clear from the record in this case, apparently the defendant unilaterally determined that the Act was invalid and refused to comply with it.

In November of 2005, this Court determined that Act 2003-343, which creates additional pension benefits for certain employees of Jefferson County, was constitutional. . . .

Before the Court is a Motion for Supplement Relief seeking to enjoin the enforcement of the Resolution.

. . .

In adopting the Resolution, the Commission did not abuse their vested discretion, and did not engage in fraud. This Court's inquiry must end there, as the authority to determine the amount of appropriations necessary for the performance of government function is a legislative power, not a judicial power ... This Court would infringe upon the boundaries between our State's branches of government delineated in Sec. 43 of the Alabama Constitution if it were to enjoin this Resolution. This Court also find [sic] that the issues presented in Plaintiff's challenge to the Resolution are completely separate and involve different facts, issues, and theories than the previous action challenging Act 03-343. Thus, the Court finds that there is no justiciable issue involved in the Plaintiffs' motion for Supplemental Relief

(*Black* Order, Sept. 18, 2006 1, 2, 3.)[3]

B. The Present Challenge to the Resolution

One hundred four individual plaintiffs filed a complaint challenging the Resolution in this Court on January 29, 2009, led once again by Steven Greene (hereinafter referred to as *"Greene II"*). As did four of the named plaintiffs in *Green I*, many of the plaintiffs in *Greene II* identified the dollar value of the sick leave retirement credit that they had to forego due to the Resolution and they supplied detailed information regarding the cost of their health care coverage. (*Greene II* Compl. at ¶¶ 1-71.)

The *Greene II* plaintiffs alleged:

> 116. The adoption of [the] resolution . . . was violative of the procedural due process rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. . . Defendants have wrongfully and constitutionally attempted by the Resolution to punish Plaintiffs and those acting with them who accepted the benefits of the Act.

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[3] The plaintiffs argue that "the record is clear" that defendants argued in the *Black* litigation that the challenge to the Resolution was not before the court. On several occasions the plaintiffs cite to "CR" for their authority. The plaintiffs originally submitted no evidence in support of the opposition, and the court is unaware to what the designation "CR" in their initial response refers. Later evidence submitted by the plaintiffs does include a "Court record" but only the appellate record to *Greene I*.

. . .

120. Plaintiffs aver that Defendants have deliberately injured and damaged them by establishing a policy of discriminating against them in intentional violation of their constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs aver that the said policy was put into place by the Resolution. Defendants first refused to implement the Act in violation of Plaintiffs' due process and equal protection rights. When the Alabama courts declared the Act valid and ordered defendants to implement it, Defendants adopted the Resolution to punish those who took advantage of the Act, again in violation of Plaintiffs' constitutional rights.

(*Greene II* Compl. ¶¶116, 120).

The 104 named plaintiffs herein are all linked to the earlier proceedings that challenged the Resolution. James Phillips was also the class representative who challenged the Resolution in the *Black* Litigation. Lovell Ravizee, Jimmy Stone, and Nina Sellers testified at the evidentiary hearing in that case relative to the challenge to the Resolution. All of the named plaintiffs in *Greene I* are Plaintiffs in this case.

Analysis

A. The *Rooker-Feldman* Doctrine

The defendants first argue that the *Rooker-Feldman* doctrine precludes this lawsuit.

> Under the *Rooker-Feldman* doctrine, the U.S. Supreme Court is the only federal court that Congress has granted jurisdiction to adjudicate a claim seeing review of a state court judgment. 28 U.S.C. § 1257; *Exxon Mobil Corp. V. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The doctrine applies to claims actually raised in state court and to claims that were not raised in state court but are "inextricably intertwined" with the state court judgment, so long as the plaintiff had a reasonable opportunity to raise the claim in state proceedings. *Powell v. Powell*, 80 F.3d 464, 466-67 (11th Cir. 1996).

In re Slizyk, No. 07-14445, 2008 WL 2123339, *2 (11th Cir. May 21, 2008).

The doctrine applies to questions that are "inextricably intertwined" with prior state court judgments. *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1265-66 n. 11 (11th Cir. 2003). It expresses respect for state court judgments. In the Eleventh Circuit, the doctrine applies when the following four criteria are met: (1) the party in federal court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive

judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding; and (4) the issue before the federal court was either adjudicated by the sate court or was inextricably intertwined with the state court's judgment. *Id.*

The "reasonable opportunity" criterion has been interpreted by district courts in this state to include claims that could have been raised in the state court proceedings. *Godwin v. Moore, et al.*, 2001 U.S. Dist. LEXIS 25298, *20 (M.D. Ala. Oct. 4, 2001). In *Godwin v. Moore*, the losing, pro se plaintiff challenged Alabama's statute prohibiting the unauthorized practice of law. The case in state court turned on whether the plaintiff was representing himself or an estate in probate court, and thus whether the statute applied to his conduct. *Id.* at *10-11. Although the plaintiff included some vague allusions to unconstitutionality in his appellate briefs, his briefs did not specifically raise a §1983 or Fourteenth Amendment claim. Neither the state trial court nor the state appellate courts reviewing the matter addressed the constitutionality of the statute. *Id.* at *18-19.

After losing in state court, Godwin sought relief in the Middle District of Alabama. He expressly pled, for the first time, federal claims under §1983 and violations of the Fourteenth Amendment. The Middle District concluded that the federal claims were "inextricably intertwined" with the state court judgment. "Simply put, the court cannot resolve issues of constitutionality without concluding what would be

tantamount to a de novo review of the judgments of [the state court]." *Id.* at *18. The federal court further concluded that even though the plaintiff's federal claims had not been raised in the state courts, the plaintiff nonetheless had a reasonable opportunity to challenge the constitutionality of the statutes, and the *Rooker-Feldman* doctrine prevented "what [was] essentially a collateral attack on the judgments" of the state court. *Id.* at 20.

With respect to the final criterion, a federal claim is "inextricably intertwined" with the state court's judgment if a federal court would essentially nullify the state court's prior judgment by resolving the claims raised in the federal complaint. *Id.* at *16, *see also Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550, 1556 (11th Cir. 1989) (holding the doctrine deprived district court of subject matter jurisdiction to address issues related to ERISA preemption because it would be required to review the essential components of the state court's judgment). Again, for *Rooker-Feldman* purposes, it matters not that a new, federal legal theory is presented to the federal court after entry of a state court judgment. *See e.g., Stack v. Mason & Associates, et al.*, 245 Fed. Appx. 920, 923-24 (11th Cir. 1007).

The "collateral attack" concept that underlies the *Rooker-Feldman* doctrine closely parallels the purpose of the Full Faith and Credit doctrine. Indeed, the United States Supreme Court case of *Exxon Mobil Corp., et al. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005) reined in the *Rooker-Feldman* doctrine in deference to the preclusion principles of Full Faith and

Credit. The Court suggested that federal courts should exercise jurisdiction in most instances since preclusion law embodied in the Full Faith and Credit Statute would protect prior judgments entered in state-court proceedings. *Id.* at 292-293. In the process, the *Exxon-Mobil* court made clear the types of cases to which *Rooker-Feldman* would still apply: when losing parties in state court invite a federal district court to overturn a state court's judgment. *Id.* at 277 n.2.

The defendants argue:

> This case presents the textbook example of applying *Rooker-Feldman*, even as narrowed by *Exxon-Mobil*. Here, Plaintiffs seek to take an appeal of an unfavorable state-court decision to a federal district court. This case clearly satisfies the Eleventh Circuit factors for applying this doctrine. First, the trial court in *Greene I* held that "neither the named class representatives nor any members of the putative class may maintain the claims raised in the complaint." Ex.B. Therefore, since all of the named plaintiffs in this action, *Green II*, were encompassed in the putative class definition in *Green I*, they are the "same parties" for purposes of *Rooker-Feldman* application.
>
> Second, the trial court issued a final judgment on the merits of Plaintiffs' claims in *Greene I*. Under Alabama law, even judgments pending on appeal are afforded preclusive effect when the losing party does

not file a supersedeas bond or otherwise obtain a stay of judgment. *Cashion v. Torbert*, 881 So.2d 408, 415 (Ala. 2003) (considering lower court judgment a "final judgment with res judicata effect" even while an appeal was pending); *see also Maner v. Maner*, 412 F.2d 449, 451 (5th Cir. 1969) ("the pendency of an appeal does not necessarily render non-final a judgment which would otherwise be enforceable under the doctrines of comity or full faith and credit").

It is further clear Plaintiffs had a reasonable opportunity to raise their federal claims in state court. Like *Godwin*, Plaintiffs' [sic] *Greene I* asserted vague constitutional claims. They had the opportunity to refine their constitutional claims and specifically allege § 1983 or Fourteenth Amendment claims by an amended Complaint or in their opposition to summary judgment in that proceeding. Whether they did in fact expand their constitutional claims in state court is irrelevant to this Court's analysis, as they cannot now raise such claims in a federal proceeding.

Lastly, it is clear from the allegations in Plaintiffs' federal court Complaint that their claims are "inextricably intertwined" with the state court judgment. That is, the constitutional allegations of the Complaint and the relief sought by Plaintiffs in this case, *Greene II*, center around invalidating

> the Resolution. See Compl. at ¶ 120. Just as they did in *Greene I*, Plaintiffs in *Green II* specifically enumerate the value of sick leave benefits they claim have been deprived and identify the cost of health insurance they are having to pay. By asking the Court to compensate them for these amounts, they are essentially asking the Court to undo the Resolution – the same relief sought in *Greene I*. Any award of damages on these grounds or any order enjoining the enforcement of the Resolution would contradict prior rulings upholding the Resolution. In other words, if Plaintiffs succeed in this forum with their federal claims, it wold effectively nullify the Alabama trial court's judgment that the validity of the Resolution is immune from attack under res judicata principles. Thus, the issues before this Court are "inextricably intertwined" with those decided in *Greene I*.
>
> This case is an attempt by Plaintiffs to obtain review and reversal of the decisions of the Jefferson County Circuit Court, which the *Rooker–Feldman* doctrine prohibits. Accordingly, this Court lacks subject matter jurisdiction over Plaintiffs' clams and should dismiss the Complaint in its entirety.

(Defs. Br. 11-14.) The plaintiff does not respond to this argument directly, but instead focuses, almost exclusively, on the *Black* litigation.

The named plaintiffs in *Greene I* were Steven Greene, Mark Persall, Larry Owen, Charles Horton, James Phillips and Cassie Bell. All of these plaintiffs are named in the instant suit. The question remains as to whether the 98 remaining plaintiffs in this action are the same as the *putative plaintiff class* in *Greene I*. That class consisted of "Jefferson County employees who have been subjected to one or more aspects of the systematic retaliation and/or administered unequal treatment by the enactment of the Resolution." The size of the class was identified as "107 Jefferson County employees." All 104 of the plaintiffs in this case are identified as present or former Jefferson County employees who were injured as a result of the Resolution. They were, therefore, members of the "putative" plaintiff class in the state court action.

There is persuasive authority that these persons, *if part of a certified class,* would be the same parties for purposes of *Rooker-Feldman*. *See e.g. Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996) (plaintiffs, who were members of state court class were barred, under the *Rooker-Feldman* doctrine, from bringing a later federal claim). However, here, there is no evidence that a class was ever certified, and movants have provided no authority that a putative class can satisfy the "same plaintiffs" requirement of *Rooker-Feldman*. Accordingly, Steven Greene, Mark Persall, Larry Owen, Charles Horton, James Phillips and Cassie Bell are the only plaintiffs in this case who are the same from *Greene I*.

The summary judgment order of September 17, 2007, was a final order in *Greene I*. The denial of the

motion to alter, amend, or vacate on October 23, 2007, was also a final judgment on the merits of the claim that the Resolution was invalid.

All that remains to be determined is whether the issue before this court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment. The plaintiffs in *Greene I* sought an issuance of "a declaratory judgment enjoining the Resolution in its entirety." (*Greene I* Compl. 12.) They claimed that they were "being retaliated and/or being treated unfairly by the Defendants enacting the Resolution." *Id.* at 11. They also claimed that "by passing the Resolution, the defendants are ignoring state law created by Act 03-343." *Id.* at 9. Further, they stated that "[t]he Plaintiffs and the class they seek to represent are not suffering and will continue to suffer irreparable injury from the Defendants' unlawful policies, practices and procedures as set forth herein unless enjoined by this Court." *Id.*

The instant plaintiffs do not argue that they did not have a reasonable opportunity to raise their federal claims in state court. Even though the claims at issue in this case do not specifically appear in the state court case, they could and should have been alleged therein.[4] Further, this case is "inextricably intertwined" with the state court judgment. As noted by the defendants, the constitutional allegations of the complaint and the

---

[4] The validity of the Resolution was adjudicated in *Greene I*. In the motion to alter, amend, or vacate, the plaintiffs made constitutional claims.

relief sought by Plaintiffs in this case center around the validity of the Resolution. The plaintiffs here, as they did in *Greene I*, specifically claim the value of sick leave benefits of which they claim they were deprived and the costs of health insurance they are having to pay. Any award of damages on these grounds or any order enjoining the enforcement of the Resolution would contradict prior rulings upholding the Resolution and effectively nullify the Alabama trial court's judgment.

As to Steven Green, Mark Persall, Larry Owen, Charles Horton, James Phillips, and Cassie Bell, summary judgment is due the defendants.

B. Full Faith and Credit

The defendants next argue that "full faith and credit" bars this action as to he remaining plaintiffs.

1. *Res Judicata*

The defendants claim that the doctrine of res judicata bars this action. It is undisputed that Alabama law on this doctrine applies.

For the doctrine of res judicata to apply:

> (1)[T]he question of fact must have been litigated and determined by a court of competent jurisdiction; (2) the final judgment must have been rendered on the merits; (3) the parties, or those in privity with them, must be of such a

> relationship to the parties in the subsequent action as to entitle them to the benefits and/or burdens of the prior litigation; (4) the same cause of action must be involved in both lawsuits.
>
> If these essential elements are met, any issue that was, or could have been adjudicated in the prior action is barred from further litigation.

West v. City of Mobile, 689 So.2d 14, 16 (Ala. 1997) (quoting *Hughes v. Martin*, 533 So.2d 188, 190 (Ala. 1988)).

The third requirement is identity of parties or privity.

> "For the parties to be substantially the same in both cases, they 'must be either the same, or in privity of estate, blood, or law with the original parties.' *Lott v. Toomey*, 477 So.2d 316, 319 (Ala. 1985). [The child] was not a party to the paternity action brought by [the mother], nor was she represented by a guardian ad litem in that proceeding. Thus, unless [the child] and [the mother] are in privity, res judicata will not apply. As stated by this Court in *Tatum v. Kelley*, 481 So.2d [1132,] 1136 [(Ala. 1985)], "'[f]or privity to exist between two people, there must be an identity of interests between them. *Butler v. Michigan Mutual Ins. Co.*, 402 So.2d 949, 953 (Ala. 1981). "Privity" has been defined as "a

> mutual or successive relationship to the same rights of property." *Sims v. City of Birmingham*, 254 Ala. 598, 607, 49 So.2d 302, 310 (1950).'

Harris v. Mitchell, 958 So.2d 884, 888 (Ala.Civ.App., 2006). No showing has been made and no authority has been cited that the parties in *Greene I* are identical to the parties in the instant case.

2. Abatement

The defendants also argue:

> The Full Faith and Credit Statute also affords state statutes the same full faith and credit in federal courts. See 28 U.S.C. § 1738. Alabama's abatement statute, Ala. Code § 6-5-40, prohibits plaintiffs from prosecuting "two actions in the courts of this state at the same time for the same cause and against the same party."

(Defs. Br. 17.)

The remaining plaintiffs were only members of the putative class in *Greene I*. The defendants cite no authority and make no showing that these plaintiffs, who are different from the plaintiffs in *Greene I*, can be barred by the abatement statute. The mere fact that the trial court in *Greene I* stated that none of the members of the putative class could maintain that action does not mean that those plaintiffs were in fact part of that action.

C. The *Younger* Abstention Doctrine

The defendants argue that the *Younger* abstention doctrine requires dismissal of this action. The plaintiffs have not responded to this argument. The rule in the Eleventh Circuit has been set out as follows:

> We review an abstention decision only for an abuse of discretion. *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000).
>
> The Supreme Court has said that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976). But "virtually" is not "absolutely," and in exceptional cases federal courts may and should withhold equitable relief to avoid interference with state proceedings. *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 359, 109 S.Ct. 2506, 2513, 105 L.Ed.2d 298 (1989). While non-abstention remains the rule, the *Younger* exception is an important one. It derives from "the vital consideration of comity between the state and national governments," *Luckey v. Miller*, 976 F.2d 673, 676 (11th Cir. 1992) ("*Luckey V*"), which *Younger* itself characterized as a "sensitivity to the legitimate interests of both State and

National Governments," 401 U.S. at 44, 91 S.Ct. at 750.

Although *Younger* concerned state criminal proceedings, its principles are "fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 433, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). "Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system ... evidence the state's substantial interest in the litigation." *Id.* "Where vital state interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims." *Id.* (citation and internal marks omitted). As the *Middlesex* Court framed the issue, "The question . . is threefold: first, do [the proceedings] constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Id.* (Emphasis omitted); see also *Old Republic Union Ins. Co. V. Tillis Trucking Co.*, 124 F.3d 1258, 1261 (11th Cir. 1997).

. . . .

[A]n essential part of the first *Middlesex* factor in *Younger* abstention analysis is whether the federal proceeding will interfere

with an ongoing state court proceeding. If there is no interference, then abstention is not required.

In order to decide whether the federal proceeding would interfere with the state proceeding, we look to the relief requested and the effect it would have on the state proceeding. *See O'Shea v. Littleton*, 414 U.S. 488, 499-502, 94 S.Ct. 669, 677-79, 38 L.Ed.2d 674 (1974); *Luckey V,* 976 F.2d at 679 (*Younger* and *O'Shea* require "focus on the likely result of an attempt to enforce an order of the nature sought here"). The relief sought need not directly interfere with an ongoing proceeding or terminate an ongoing proceeding in order for *Younger* abstention to be required. In *O'Shea*, the Supreme Court held that abstention was required where an injunction would have "indirectly accomplish[ed] the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent." *Id.* at 500, 94 S.Ct. at 678 (emphasis added). The plaintiffs in *O'Shea* did not seek to enjoin directly any pending prosecutions but apparently did seek a federal court injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. The requested injunction contemplated interruption of the state proceedings in order for the federal court to adjudicate compliance by the defendants with the injunction, through what

the Supreme Court called "an ongoing federal audit of state criminal proceedings." *Id.* at 500, 94 S.Ct. at 678. The Court found that the injunction "would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio." *Id.* at 501, 94 S.Ct. at 679.

We applied the reasoning of *O'Shea* in *Luckey V*, 976 F.2d at 678-79. In that case, the plaintiffs had asserted a class action on behalf of "all individuals who are or will in the future be adversely affected by the unconstitutional practices of the indigent defense system within Georgia." *Id.* at 676. They sought injunctive relief to reform the indigent defense system, including orders that the system provide speedy appointment of counsel and ensure that there would be counsel at all probable cause determinations, and would have required monitoring the implementation of the injunction. *Id.* Adopting in full the explanation in the district court's abstention order, we concluded that the decree requested by the plaintiffs inevitably would interfere with state criminal proceedings. *Id.* at 677.

Luckey V did not involve a direct termination of ongoing state proceedings, and the plaintiffs did not directly contest any single criminal conviction or seek to restrain any individual prosecution. Nevertheless, as

> we observed, the injunctive relief the plaintiffs sought would have had the effect of restraining every indigent prosecution until the systemic improvements they wanted were in place. *Id.* We focused on the effect of the requested relief on the state proceedings. *See id.; see also Joseph A. Ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1272 (10th Cir. 2002) ("*Younger* governs whenever the requested relief would interfere with the state court's ability to conduct proceedings, regardless of whether the relief targets the conducts of a proceeding directly.")(*citing News-Journal Corp. V. Foxman*, 939 F.2d 1499, 1511 (11th Cir. 1991)(affirming district court's decision to abstain under *Younger* from hearing newspaper's challenge to state court's pre-trial order because an injunction would restrict the ability of the state court to impanel an impartial jury)).

31 Foster Children v. Bush, 329 F.3d 1255, 1274-1277 (11th Cir. 2003).

In the instant case, the *Younger* abstention doctrine applies. All three *Middlesex* factors require this Court to abstain from exercising jurisdiction over the claims asserted in this federal Complaint. First, while the Jefferson County Circuit Court judgment is entitled to be treated as a final judgment, it was appealed by the plaintiffs in *Greene I* and is currently pending before the Alabama Supreme Court. If this court were to grant the relief requested by the plaintiff, it would effectively bar any action taken by the state

courts. Second, the proceedings most certainly implicate a number of important state interests. The crux of the complaint turns on the validity of a legislative enactment of the Jefferson County Commission, a political subdivision of the state, which affected discretionary employee benefits for government employees. The state mandates that the County maintain a balanced budget. Ala. Code § 11-8-3. This balanced budget is threatened by the judicial attacks on the Resolution. The important state interests implicated by this case include the County's ability to enforce enacted state legislation and plan for future budgetary needs within the confines of the state's balanced budget law. Last, an Alabama court clearly has concurrent jurisdiction over § 1983 claims and properly pled federal constitutional claims. *Terrell v. City of Bessemer*, 406 So.2d 337, 340 (Ala. 1981)(§ 1983 claims); *Ex parte McCord-Baugh*, 894 So.2d 679 (Ala. 2004)(federal equal protection claim). Through their initial state complaint, summary judgment briefing, post-judgment motions, and now in appellate pleadings, the plaintiffs have had numerous opportunities to raise constitutional challenges and federal claims in state court. *See also Butler v. Ala. Judicial Inquiry Comm'n*, 261 F.3d 1154, 1159 (11th Cir. 2001)("when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."). Allowing this case to proceed in the face of appellate review of the trial court's dismissal would result in undue interference with state proceedings. As to all plaintiffs in this action, whether named in *Greene I* or

not, the *Younger* abstention doctrine applies to bar this action.

Recommendation

Based on the foregoing, it is RECOMMENDED that the defendant's motion to dismiss (doc. 4), now motion for summary judgment, be granted as to the instant plaintiffs who were named in the state action, Steven Greene, Mark Persall, Larry Owen, Charles Horton, James Phillips and Cassie Bell, on the authority of *Rooker-Feldman*, that the motion be granted as to all of the instant plaintiffs who were or were not named in the previous action, on the court's discretionary authority as set out in the *Younger* abstention doctrine, and that this case be dismissed.

DONE this 11th day of September, 2008.

/s/ Robert R. Armstrong, Jr.
Robert R. Armtrong, Jr.
United States Magistrate Judge